Supreme Court of the United States.

OCTOBER TERM, 1873.

THE CITY OF MEMPHIS
vs.
T. E. BROWN.
No. 226.

BRIEF FOR APPELLANT.

This cause comes by appeal from the Circuit Court of the United States for the western district of Tennessee.

The city of Memphis filed its bill in equity against T. E. Brown, and Brown filed his cross-bill against the city. The relief prayed by the city was denied and a decree upon of the cross-bill was made in favor of Brown. The city appealed.

Transactions before the Commencement of this Suit.

The controversy grows out of certain contracts made in 1867 for paving certain streets of the city with the Nicholson wooden pavement; and the transactions so far as they are material to be understood were as follows:

On the 11th day of March, 1867, the city contracted with a firm styled Taylor, McBean & Co. to pave Madison street, and certain other streets; and subsequently on the 13th of November, 1867, certain other streets were contracted for on the same terms. The prices of the work were, for pavement per square yard, $3.88; for new curbstone per lineal foot, $1.60; for resetting old curbstone per lineal foot, 25 cents. (Rec. p. 24.)

The terms of payment were as follows:

"Upon the completion of each section the contractors shall receive from the owner or owners of lots fronting upon said section one-half of the price of the same in cash, the remaining half to be paid by the said owner or owners in thirty, sixty, and ninety days, they giving their notes for the same, with the lien fixed by the city charter retained in said notes.

"The accounts for said pavement will be made out upon the completion of each section by the city engineer against the property owner or owners, and delivered to the contractors for collection, and if not paid according to the terms above specified within ten days after said payment becomes due, said accounts, or so much as shall be due and unpaid, shall be placed in the hands of the city attorney for collection under the city charter.

"The city of Memphis will, and does hereby guarantee to the contractors the payment of said accounts, as so assessed against the property owner or owners for the pavement, according to the plans and specifications.

"The privilege to use the Nicholson pavement will be secured by the city for the use of the contractors at a charge to the contractors of fifteen cents per superficial yard, the same to be deducted by the city for any work done by the contractors, for which the city will have to pay the contractors.

"The city is to pay for the intersections of the streets and alleys and that portion of the public squares and other property belonging to the city, where the owners of the property are not required to pay, upon the same terms as above set forth for the property owners." (Rec. p. 25.)

These contracts are called the "cash contracts."

On the 16th of July, 1867, the city contracted with a firm styled Forest, Montgomery & Co., for paving five streets with the same description of Nicholson pavement.

The prices were for pavement per square yard $5.25; for new curbstones per lineal foot $1.75; for resetting old curbing per lineal foot 20 cents. The terms of payment were as follows:

"Upon the completion of each section the contractors shall receive from the city the whole amount due under the conditions of this contract for said section, the same to be paid in Memphis city paving bonds, payable in five, ten, and fifteen years in equal proportions, with six per cent. coupons attached, payable semi-annually. Principle and interest guaranteed and provided for by a sinking fund set aside for that purpose. Bonds to be taken at par.

"The privilege to use the Nicholson pavement is secured by the city for the use of the contractor, and the sum of twenty-five cents per yard is to be deducted from the contract price for paving for the purpose of paying for said privilege and contingent expenses." (Rec. p. p. 33.)

This was known as the "bond contract."

The style of Forest, Montgomery & Co. was subsequently changed to Forest, Mitchell & Co., and on the 15th of October, 1867, Forest, Mitchell & Co. addressed to the city council the following communication:

"MEMPHIS, TENN., *October* 15, 1867.

"Having made arrangements with Taylor, McBean & Baldwin to complete the work of paving the streets unfinished under our contracts with the city, we ask that your board will substitute them for us both in the remaining, original and modified contracts.

"FOREST, MITCHELL & CO."

On which in the council proceedings was entered the following action:

"Prayer granted." (Rec. p. 119.)

On the same day the following assignment was executed:

"For valuable consideration received from Tayler, McBean & Baldwin, the undersigned, Forest, Mitchell & Co., sell, assign, transfer and set over to Taylor, McBean & Baldwin, all our right, title and interest in and to all the contracts for paving various streets in the city of Memphis, made between the board of mayor and aldermen of the city of Memphis, and Forest, Mitchell & Co., and also in and to any and all claims for debts, demands and damages against said city of Memphis already accrued, and that may hereafter accrue for any and all breaches of any and all such contracts, or in any wise growing out of such contracts, with the right to sue for and recover the same in their own names, or in our names, for their sole use and benefit, they saving us harmless from all costs, expenses and damages by reason of any such suits. This assignment is without any recourse to us.

"Signed this 15th day of October, 1867,

"FOREST, MITCHELL & CO.,
By JOS. MITCHELL.
"FOREST, MITCHELL & CO.,
By N. B. FOREST."

(Rec. p. 312.)

By an agreement made by the city with Taylor, McBean & Baldwin on the 15th of October, 1867, the contract of Forest, Mitchell & Co., was modified by reducing the prices and changing the mode of payment. The price of pavement was reduced to $3.95 per yard in Main street, and to $3.89 in the other streets; curbing was reduced to $1.60 per foot, and resetting the curbing was raised to 25 cents per foot.

As to payment, it was provided:

"The amounts so fixed to be assessed and collected from the property holders whose property abuts said street in the manner and form prescribed by the contracts of the city of Memphis with Taylor, McBean & Co., executed

on the 18th day of March, 1867, and which contracts, so far as relates to the conditions herein set forth, shall bind on the parties. But, for the property belonging to the city of Memphis, abutting said streets, and the intersections of all streets and alleys upon said streets above named, the said Taylor, McBean & Baldwin shall be paid in the paving bonds issued by the city of Memphis, upon the terms and conditions specified and set out in the original contract with the said Forest, Montgomery & Co., as above referred to, * * and it is further agreed by the city of Memphis that it will make no charge against the said Taylor, McBean & Baldwin for the engineering and royalty privileges of that portion of the said work on said streets in front of the city's property or at the intersection of said streets and alleys." Rec., p. 35.

On the 6th day of May, 1868, the two firms of Taylor, McBean & Co. and Taylor, McBean & Baldwin presented to the city council the following petition:

"The petitioners, Messrs. Taylor, McBean & Baldwin and Taylor, McBean & Co., would respectfully request your honorable board to permit them to transfer to T. E. Brown & Co., a firm composed of T. E. Brown and J. Langdon, all of their contracts that they have made with the city of Memphis for the grading and paving of the streets of the city. These contracts embraced those first made by Taylor, McBean & Co., and those transferred by the city from Forest, Mitchell & Co. to Taylor, McBean & Baldwin, and embrace all the unfinished streets contained in these contracts as well as all the unsettled and unadjusted claims due said contractors by the property holders and city, and ask that the streets already awarded by your board to the petitioners, but not under contract, be also awarded to said firm." (Rec. pp. 120, 121.)

This petition was referred to a committee who reported June 2, 1867, in favor of the transfer, but "to embrace

all the unfinished streets contained in these contracts, and none others, as well as all the unsettled and unadjusted claims due the contractors by the property holders and city."

This report was adopted. (Rec., p. 121.)

On the 6th day of May, 1868, the following assignment was executed:

"For value received, the undersigned, Taylor, McBean & Co. and Taylor, McBean & Baldwin, hereby sell and assign to T. E. Brown & Co., all right, title, and interest in and to all the contracts for paving divers streets in the city of Memphis, made by the board of mayor and aldermen of the city of Memphis, with Forest, Mitchell & Co., and Taylor, McBean & Co., and Taylor, McBean & Baldwin, and also in and to all claims for money due, and that may become due from said city of Memphis and from the property owners, and for all damages against said city of Memphis, or against, *or against*, the property and property owners, by reason of failure to comply with the stipulations in any of said contracts, including all claims for damages heretofore sustained by said several contracting parties, or any of them, by reason of the breaches of its contracts by said city, and by the property owners; and also all claims for damages for any breaches by said city, or by the property owners, that may be hereafter committed or suffered. And said T. E. Brown & Co. may sue for and recover any such claims for debts or damages in their own names, or at their option, in name or names of the undersigned, they saving us harmless from all costs and damages. It is understood and agreed that in making this assignment *that* we incur no liability for non-payment of any debts or damages due to us from the city of Memphis, or from the property holders of the city of Memphis, and that all debts and damages are to be collected by said T. E. Brown & Co. at their own risk and expense.

"Signed this 6th day of May, A. D. 1868.

"TAYLOR, McBEAN & CO.

"TAYLOR, McBEAN & BALDWIN."

(Rec. p. 312.)

On the 26th of August, 1868, the city agreed to lend T. E. Brown & Co. one hundred paving bonds of $1,000 each, "the said loan to be for the space of eighteen months. At the end of said eighteen months the parties of the second part agree to return to the said city of Memphis the said one hundred paving bonds, principal and interest, both accruing and past due."

For the security of said city it was provided that Brown & Co. would turn over to the city accounts against the property owners for pavement to the amount of $100,000, with the privilege of withdrawing any of them for settlement with the debtors, on substituting therefor other accounts to the same amount, so as always to keep in the hands of the city the same amount of $100,000. It was further understood that Brown & Co. might at any time within the eighteen months return any of the bonds, and receive a pro rata amount of said claims for pavement. Then came this clause, "It is further understood and agreed that as the money is collected upon said accounts it is to be retained by the city of Memphis, and to be held until a final settlement between said parties, and as a security for the return of the above described one hundred bonds, principal and interest." (Rec., p. 36.)

On the 20th of November, 1868, the city agreed to loan T. E. Brown & Co. 175 paving bonds of $1,000 each. The agreement is as follows:

"STATE OF TENNESSEE, }
Shelby County. }

"This agreement, made and entered into this 20th day of November, 1868, between the board of mayor and aldermen of the city of Memphis, through the mayor, of the

first part, and T. E. Brown & Co., contractors for the Nicholson pavement, of the second part, witnesseth: That whereas the party of the first part, in session on the 18th day of November, 1868, did pass the following resolution, to wit:

'*Resolved*, That the city will loan Messrs. T. E. Brown & Co., the contractors of the Nicholson pavement, one hundred and seventy-five thirty-year one thousand dollar pavement bonds for eighteen months, upon condition that the said contractors will place in the hands of the city attorney paving bills against the property holders to the amount of the face value of said bonds; and upon the further consideration that said contractors will release the city upon all liabilities upon said paving contract, unless it should be decided by the courts of last resort that the property holders are not liable for said pavement. The interest upon said bonds shall be paid by the said T. E. Brown & Co., and at the end of said eighteen months said bonds shall be returned to the city, principal and interest, unless said interest has been previously paid.'

"Which said resolution embraces all the conditions of said loan, and is accepted by the parties of the second part. It is further agreed by said parties that the city will furnish said bonds as rapidly as they can be executed, and that as said bonds are delivered to the said T. E. Brown & Co., the said T. E. Brown & Co. will deliver to the city attorney the collaterals to secure the same. This agreement is in no wise to effect or modify the terms and obligations of the original contracts for paving the streets of Memphis with the Nicholson pavement, as now existing between the parties or the owners of the lots abutting on the streets, except when said contracts are changed and modified by the above resolution of the board of mayor and aldermen and this agreement. In witness whereof the parties have hereunto set their hands and affixed their

seals, and the seal of the corporation, the day and year above written.

"T. E. BROWN.
"JOHN F. LEFTWICH,
Mayor."

(Rec., pp. 36, 37.)

On the 29th of March, 1870, T. E. Brown & Co. brought an action at law against the city in the circuit court of the United States for the western district of Tennessee, setting forth the paving contracts, the performance of the work, the issuing of the paving accounts, the non-payment of a portion of them within ten days after they became due, and the liability of the city by virtue of the guarantee to pay those not so paid.

The first four counts are on accounts issued under contracts of March 11, 1867, with Taylor, McBean & Co.

The fifth count is on accounts issued under contract of November 13, 1867, with the same parties.

The sixth, seventh, eighth, ninth, and tenth counts are on accounts issued under contract of July 16.

The eleventh and last count stricken out. (Rec., 402, fol. 869.)

The defendants demurred. (Rec., 168.) Overruled. (Rec., p. 402.)

The defendants pleaded, among other matters, (2d) the agreement of November 20, 1868, that it was not liable to pay until the property owners should have been declared not liable.

(4th.) Also that the city was not liable until the plaintiffs had exhausted their remedies against the property owners. And (7th) also denied the several transfers of the demands of Taylor, McBean & Co. to the plaintiffs, J. E. Brown & Co. (Rec., pp. 170, 171.)

The plaintiff demurred to these pleas. (Rec., pp. 172, 173.) The demurrer was sustained without leave to plead over, but with leave to give the matters pleaded in evi-

dence under the general issue. [This on 2d day of November term, 1870, and the case was not further proceeded in.] (Rec., p. 402.)

Proceedings and Pleadings in this Cause.

This suit was commenced in the State court by a bill filed by the city of Memphis against T. E. Brown (Langdon being dead) on or before the 17th of November, 1870, and transferred on the 26th of the same month, on the petition of the defendant, to the United States circuit court. (Rec., pp. 1, 45, 46.)

The bill set forth the several paving contracts and transfers to T. E. Brown & Co., confining its case, however, only to those provisions concerning the immediate liability of the city, and alleging that the contractors had been over paid by the city on each class of contracts—the one class being known as "bond contracts," and the other as "cash contracts." The bill also set forth the loan contracts, averred performance on the part of the city, and non-performance on the part of the contractors in this, that they had not deposited the paving accounts required by the contracts, and that Brown was collecting the said accounts and retaining the money.

The bill prayed an account to be stated between the city and Brown and for a decree for the amount found due; for a decree that the proceeds of the paving bills collected by Brown be brought into court; for an injunctionto restrain Brown from collecting any more of the paving bills pledged to the city; and from collecting any more paving bills whatever until the proper amount had been deposited to secure the city; and from commencing any more suits against property owners, except through the city attorney, unless he should elect to release the city from its liability.

It will be convenient at this point to give reference to all the subsequent proceedings, viz:

Injunction issued and served November 21, 1870. (Rec., p. 43.)

Answer of Brown, filed November 30, 1870. (Rec., p. 46.)

Motion to dissolve injunction, filed November 30, 1870. (Rec., p. 130.)

Motion allowed and injunction dissolved. (Rec., p. 403.)

Exception of city to Brown's answer, December 7, 1870. (Rec., p. 128.)

Amendment of Brown's answer, December 17, 1870. (Rec., p. 63.)

Cross-bill filed by Brown, January 4, 1871. (Rec., p. 66.)

Motion by city to take cross-bill from files, January 2,(?) 1871. (Rec., p. 129.)

After filing of the cross-bill an order was made by consent that the city reply to defendant's answer and answer to cross-bill by the first Monday in February; and also that leave be given to both parties to proceed to take testimony. (Rec., pp. 403–4.)

Answer of city to cross-bill, filed March 29, 1871. (Rec., p. 124.)

Amendment to cross-bill, filed March 29, 1871. (Rec., 122.)

Answer of city to amendment to cross-bill, filed April 4, 1871. (Rec., p. 126.)

Replication of Brown to answer of the city to cross-bill, filed April 7, 1861. (Rec., p. 130.)

Leave given to Brown "to amend his cross-bill by adding thereto the matters embraced in this court wherein he is plaintiff and the city of Memphis is defendant, which is now done, and the city of Memphis will answer thereto within one week." And the court orders a stay in said action at law. (Rec., p. 404.) [The date of this order is not given. It seems subsequent to the last amendment to

the cross-bill as in said amendment the declaration in the action is referred to as part of the record on the law side of the court, and in the answer to the amendment no notice is taken of the action at law.]

Motion by Brown to refer the cause to a master "to find and report of and concerning the following matters," &c.:

April 13, 1871. (Rec., p. 173.)

Order of reference made upon the motion of T. E. Brown," resisted by the city of Memphis April 24, 1871. (Rec., p. 404.)

City excepts to said order at the time. (Rec., p. 408.)

Report of the master, filed September 2, 1871. (Rec., pp. 324 to 357.)

Motion by the city to suppress the report, as referred prematurely and irregularly, filed 20th September, 1871. (Rec., p. 364.)

Exceptions by the city to the report, filed 2d October, 1871. (Rec. 365.)

Motion to suppress the report overruled March 26, 1872. (Rec., p. 408.)

Decree March, 1872. (Rec., p. 409.)

Omitting those matters in the bill and cross-bill which were properly matters of account, the following matters were put in issue by the pleadings. In the answer of Brown it is averred that—

As to the first bond loan contracts only eighty-nine bonds were delivered under it, and those only worth fifty cents on the dollar, and that Brown did deliver $100,000 in paving bills.

As to the second bond loan contract, he says a large amount was due him for work done before the property of private parties, neither they nor the city would pay; the city disputed its liability except as guarantor, and under these circumstances the loan contract was made, yet knowing the need of the defendant was immediate,

the city deferred for a long time to deliver the bonds, and instead gave only acceptances or written promises to deliver bonds which could only be negotiated at a loss; only one hundred and forty bonds were delivered by May, 1868, and the residue, $35,000, never delivered; that the bonds were worth only fifty cents on the dollar, and he sold them for so much only; he offers to deliver up the acceptance for thirty-five thousand dollars; avers that it was the duty of the city to have collected the paving bills so deposited, or obtained the decision of the court of last resort within the eighteen months, but the city instituted no suits, and collected no bills, and so the stipulation for a release in said contract is void. The answer enters into full particulars as to the amounts of paving bills, &c.

The answer also sets up the indebtedness of the city as guarantor of the paving bills; and gives notice of matter to be set up in a cross-bill to be by him filed, and which being so set up, are not necessary to be here mentioned.

Great part of the answer is filled with details of accounts. (Rec., pp. 47 to 57.)

The cross-bill set forth the following matters:

That by the transfers and assignments and by the agreement of the parties thereto and the city, Brown & Co. became entitled to all the claims of Taylor, McBean & Co., and were entitled to recover for all damages suffered by the original contractor as well as for work done by them; and that the city agreed to pay Brown & Co. for work and material furnished by Taylor, McBean & Co. and all claims whatsoever heretofore existing in favor of Taylor, McBean & Co. (Fol. 148–9.) The cross-bill also sets forth a similar agreement by the city in respect to the contracts made by Forest, Montgomery & Co. Fol. 153–4.)

The cross-bill then sets up that the city falsely held out as inducements to the contracts that it would pay in cash for certain parts of the work and in secured bonds for

other parts; that by reason of such false inducements one of the partners of Brown & Co. became involved for the prior contractors, and found it necessary to assume said contracts; that the city did not perform its part but repudiated its obligations; that it failed to secure the bonds or to collect the paving bills or to pay for the paving, and in various ways dealt with Brown & Co. deceitfully and wrongfully; and that upon a just accounting, independant of the matters in suit at law, the city is indebted to defendant. Upon such an account he would be entitled to credit for extra work, for damages by reason of suspension of work, for attorneys fees for collecting paving bills, for other expenses in making such collections. (Fol. 158.)

And the defendant claims a credit of $143,705 for the default of the city to provide a sinking fund, as it had expressly contracted to do, and as the cross-bill alleges, "*Agreeing that it would so provide for the prompt payment of the interest on said bonds, and that by the creation of said fund such bonds and their prompt payment would be completely secured and gurranteed so that such bond would rank and be known as first-class negotiable securities, and would be of a class of a negotiable security, well known in the commercial and monetary markets of the country a marketable security and worth par or approximately thereto. And as the plaintiff is informed and believes said contracts were made and entered into on the faith of the representations of said corporation that such securities should be of such class whereby from their hypothecation or judicious sale the work of paving could be successfully prosecuted.*" It then proceeds to allege that the city so neglected so to secure the bonds so that they were worth only fifty cents on the dollar, and the city ought to be liable for the difference, and that the loan of bonds ought to be held as a payment of the indebtedness of the city at their actual value, which was fifty cents on the dollar. (Rec. pp. 66 to 72.)

The city's answer to the cross-bill denies all the allegations of the cross-bill, except so far as admitted in the answer or in the original bill filed; denies all bad faith; denies that it was in any way responsible for Brown's assuming the contract; denies the right of Brown to require the loaned bonds to be treated as payment, or to put any value on them; insists on the obligation to return them, but if embraced in the account, must be at par. (Rec. pp. 124, 125.)

The amendment to the cross-bill claims to bring into the account the whole amount of work done for the city "*approximating* $1,000,000, *besides such as is included in the cross-bill*," of which the city has paid about one-half; sets forth the issuing of accounts for said work, the partial payments by property owners, and the refusal of the city to pay the balance; refers to the declaration in an action at law in this court for greater particularity; avers that the accounts are complicated, involving many entries by mutual accounts, &c., &c., and that for the avoidance of a multiplicity of suits, an account should be stated, &c. (Rec. pp. 122, 123.)

The city's answer to the amendment denies its obligation to pay the paving bills; insists on the second bond loan contract as a perfectly fair transaction, intended to suspend claims of Brown & Co. on the guarantee, until a judicial determination of the liability of the property holders, and to sustain Brown & Co. while the question was pending, &c., &c. (Rec. pp. 126, 128.)

On the 13th of April, 1871, the counsel for Brown moved the court "to order an interlocutory decree of reference" to the clerk of the court as master to find and report to the court "concerning the following matters," specifying certain facts in relation to the work done and the value thereof, and the payments and advances made. (Rec., p. 173.)

On the 24th of April, 1871, the court decreed as follows:

"The cause being at issue, and coming on for hearing, *upon the motion of T. E. Brown*, by his solicitors, for a decree *referring certain matters* herein to a master at this time, which was resisted by the city of Memphis, and it was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed that this cause, so far as relates *to the issues on the bill and cross-bill* joined and *hereafter named*, be referred to A. S. Mitchell, who is appointed the master in chancery in this court, to take proof, and hear and report to this court so soon as practicable the proof taken, and of his conclusions upon the proof taken and to be taken concerning the following matters and things, to wit:

"1. That *he state an account* between the plaintiff and defendant, embracing therein all the matters involved in the cause of the bill and cross-bill herein, and showing in the result the aggregate balance of indebtedness of the debtor party to the other."

Then follow twenty-five specifications of particular facts, and the decree concludes thus:

"But nothing contained in this order or decree is to be construed to limit the right of either party to take testimony as provided by law, nor to abridge any other right. And the master is to consider, in making his report, all the testimony that may be taken by either party according to law, up to the time of reporting, as well as such as has heretofore been taken, and all other matters and things involved herein are reserved till the coming in of the master's report." (Rec., pp. 404 and 408.)

The city excepted to the making of the order of reference. (Rec., p. 408.)

The master reported on the 2d of September, 1871. (Rec., pp. 342 to 363.) The city moved to suppress the report, because, among other reasons, the reference was irregular and improper, and made prematurely, and be

cause it abridged the time allowed by the rules of the court for taking testimony, and compelled the city to submit its right to be reported on, without the opportunity to make proof, provided by the due course of proceedings. (Rec., p. 364.)

On the day of November, 1871, this motion was overruled, (Rec., p. 408,) and the decision excepted to.

Exceptions to the master's report were filed October 2, 1871, (without waiving the motion to suppress) and at November Term, 1872, a decree was made, as follows:

"In this cause at a prior day of this term, the court having delivered an opinion upon the motions involved herein after argument thereof by counsel, and the submission thereof to the court at a prior term of this court, the cause came on to be further heard at this term *upon exceptions* to the master's report and upon the proof on file, and it appears to the court that the exceptions are not well taken, the same are hereby severally overruled, and the report of the master is confirmed, except as to the item of $115,216 damages suffered by the failure to provide a sinking fund, [which was reduced to $89,808] and as so modified said report stand confirmed."

The relief prayed by the bill of the city was denied, except so far as embraced in the master's report, and it was decreed that Brown recover of the city $488,993, with interest from the date of the decree. Appeal was prayed and allowed. (Rec., pp. 409 and 410.)

Assignment of Errors.

I.

1. There was no hearing on the merits. The decree was in effect made on the master's report alone.

2. The reference to the master was premature and irregular, being made before the cause was ready for hearing, and without any hearing on the merits.

II.

The court erred in denying the relief prayed in the bill of the city in respect of the loan contracts.

III.

The court erred in overruling each of the following exceptions:

The auditor in his report—

1. Finds a total failure to provide a sinking fund according to the stipulations in the contract with Forest, Montgomery & Co., by which the value of the bonds was reduced thirty-five to forty cents on the dollar, and allows Brown damages for the failure of the city to provide a sinking fund, amounting to $115,216. (Rec., pp. 346, 348.)

This was duly excepted to. (Rec., pp. 366, IV, No. 5 to 10.)

2. He awards damages against Brown & Co. for failure to return the loaned bonds at only fifty cents on the dollar, and whereas the bonds and interest amounted, August 1, 1871, to..... $282,020

They are charged against Brown at.. $60,784

And..... 85,929

146,713

Making a loss to the city..... $135,307

(Rec., p. 354, 355, No. XIV, and 348, Nos. 1, 2.)

This was duly excepted to. (Rec., p. 366, III, Nos. 1 to 4.)

3. He finds that the city over-paid on the bond contracts $55,334.83, and charges the surplus to Brown at fifty-two cents on the dollar, or $28,774.11, making a loss to the city of $26,560.72. (Rec., pp. 349, 350.)

This was duly excepted to. (Rec., p. 368, VI, Nos. 1 to 5.)

4. He finds that the agreement of November 20, 1868, releasing the city from its liability for the paving bills

was coerced from Brown & Co. in their desperate pecuniary straits, and that in equity and good conscience it ought not to stand. And that if valid still it was conditional upon the performance by the city of its promise to loan $175,000, and the city did not loan $175,000, but only $140,000.

He interprets the guarantee of the city to be for payment of half cash, and the balance in thirty, sixty, and ninety days, and holds that on the failure of the property owners to pay within those dates the liability of the city became absolute.

He therefore charges the unpaid paving bills against the city..... $431,171.18
And interest from 30 days after date thereof 77,234.00

$508,405.18

(Rec., pp. 346, 7th, 8th, and 9th, and p. 348.)

This was duly excepted to. (Rec., p. 366, IV, Nos. 1 to 4.)

5. He charges the city with the expenses of the contractors in collecting the paving bills, $35,000. (Rec., p. 349, Nos. 4, 5.)

This was duly excepted to. (Rec., p. 367, IV, Nos. 11, 12.)

6. He credits Brown & Co. with discount on scrip received by them to the nominal amount of $40,000, charging it at $17,822.50, making a loss to the city of $22,177.50.

(Rec., pp. 346, 11th, and p. 350, Nos. 1, 2.)

Excepted to. (Rec., p. 368, VII, Nos. 1 to 7.)

7. He credits Brown & Co. $4,800 discount on $12,000 bonds received by Taylor, McBean & Co. (Rec., p. 350, No. 6, p. 354, No. XIII.)

Excepted to. (Rec., p. 369, VII, No. 12.)

8. He gives some minor credits to Brown:

Adjusting track..... $2,830
Damages for suspending work 3,000

(Rec., p. 349, Nos. 6, 7.)

Duly excepted to. (Rec., p. 367, IV, Nos. 13 to 16.)

And charges him only with royalty collected, instead of the entire amounted accrued, amounting to ($27,265.39 and $14,966.29 chargeable, less $18,840.84, $8,424.50, and $5,165.86 charged;) a difference of $9,801.11.

(Rec., p. 348, Nos. 3, 4, p. 349, No. 2.)

Excepted to. (Rec., p. 366, III, No. 5, and p. 367, V, No. 3.)

All these exceptions were overruled, except that in regard to the amount for damages for failure to provide a sinking fund. This the court reduced from $115,216 to $89,808.

I.

The pleadings raised issues going to the merits of the cross-bill.

By the cross-bill the defendant sought an account in respect of the paving bills guaranteed by the city. The city set up a release in bar of the account. That should have been passed upon by the court.

By the cross-bill the defendant set up a right to an account in respect of damages, &c., which had accrued to the original contractors, and claimed under them by assignment alleged to be with the consent of the city, and also under a contract to that effect by the city. (Rec., p. 67, fol. 149.) This was denied by the city, and being the ground of the account, should have been decreed or passed upon by the court before reference. The entire decree in favor of Brown rests on these two claims. Strike them out, and the balance is in favor of the city.

And then there were charges in the cross-bill of false inducements held out by the city to the contractors, false representations made as to the value of the bonds, oppression, bad faith, and deceit; none of which could properly be considered by a master in taking an account, and which should have been passed upon by the court before reference.

The city was entitled to three months to take its evidence, but the reference was made in seventeen days after replication filed, and in less than 30 days after the great mass of the claims had been brought into the case by the amendment to the cross-bill.

In Consequa *vs.* Fanning, 3 J. C. R., 587, 595, Chancellor Kent said, upon a petition for rehearing in order to reform an order of reference:

"I take it for granted that an order of reference must be founded upon the pleadings and proofs, and that it cannot be made more extensive than the allegata and probata of the parties."

In Egerton *vs.* Reilly, 1 Gill and J., 389: While exceptions to answer were pending the case was referred, the auditor reported, and his report was confirmed. By the court: "The exceptions to the answer being disposed of, the case should have been set down for argument, on bill and answer or a replication put in, and an opportunity afforded to the respondents to make out their defense by proof. * * * We will reverse the order confirming the auditor's report."

In Dan. Ch. Pr. p. 997, it is said that at the hearing of a bill for account it is only necessary to read so much of the evidence as to show that the complainant is entitled to an account.

Before referring the cause to a master to state an account, the court should, by an interlocutory decree made at the hearing, have settled the rights of the parties and made an order of reference, "not more extensive than the allegata and probata of the parties." (McLin *vs.* 1 D. & B., 407; Neale *vs.* Hagthorp, 3 Bland, 551.

II.

It was error to deny the relief prayed in the bill of the city, and to decree, as in substance it is decreed, that the securities for the return of the bonds shall be delivered

up, the contract put an end to, and the city compensated in damages for the failure to return the bonds.

Brown had no right to elect to consider the contract at an end and to discharge himself from its performance by compensating the city in damages.

The city had a right to insist, and did in its bill insist, that Brown be held to the performance of his contract, and that the securities pledged for the return of the bonds be left in its hands until the return of the bonds.

Even if the fifty per cent. allowed the city in the account be a sufficient security, equity cannot, on the case made, so declare and decree a portion of the security to be delivered up.

In the first contract it is expressly provided that the proceeds of paving bills collected shall be "*retained by the city of Memphis*" until a final settlement between the parties, "*and as a security* for the return of the above-described one hundred bonds, principal and interest." So that even if the city be charged with the amounts of paving bills as cash, it is entitled to retain this cash to meet the bonds. (Rec., p. 36.)

But the decree deprives the city of this security, compels it to pay over one-half of the fund, and leaves it but fifty cents to meet each dollar of bonds, in palpable and undeniable contravention of the express agreement of the parties. There is no allegation and no proof tending to impeach the perfect good faith of this first bond-loan contract, and no reason to set it aside. It is true the bill charges that the loan was made without authority of law; but this merely means that the city officers exceeded their authority. It is well settled that agents may in some cases exceed their authority, and yet bind their principals. The city does not charge that the contract is void, or seek to have it so declared void, but seeks to enforce it.

The same view is to be taken of the second bond-loan contract, which differs from the first in not expressly de-

claring that the proceeds of the paving bills collected shall be retained as security for the return of the bonds; but that result necessarily follows. If the bills be paid the money received for them takes their place.

III.

First Exception.

As to the allowance to Brown & Co. of damages for failure to provide a sinking fund.

If damages were due to any one it was not to Brown & Co.

(a.) Of the bonds issued, and for the failure to secure which damages are allowed Brown & Co., $150,000 were paid to Forest, Mitchell & Co., (Rec., p. 259, fol. 511 and 512, p. 261, fol. 521,) and at least $54,000 to Taylor, McBean & Baldwin. They received $36,000 in 1867, (Rec., p. 261, fol. 521; Rec., p. 261, fol. 520, int. 9, and in Rec., p. 293,) 14 bonds in April, 1868, and T. E. Brown & Co., April 28, receipted for 4 more, making in all (36 + 18) 54 bonds issued on the bond contract before Brown acquired it. How many of the remaining (215–54) $159,000 were paid to Taylor, McBean & Baldwin, and how many to Brown & Co., there seems no mode of accurately determining. But as to the $204,000 thus shown affirmatively to have been paid to the original contractors, Brown & Co., can have no claim. If the original contractors had such a claim, they have not transferred it. The assignment set up in the cross-bill is one which the city is alleged to be party to; the agreement of the city in the premises, is at Rec., p. 121, and embraces "the unsettled and unadjusted claims due the contractors by the property holders and the city." No claim had ever been made by the contractors for such damages. If any was contemplated (and damages are mentioned in the assignment from Forest, Mitchell & Co., to Taylor, McBean & Baldwin) it was sedulously concealed from the city, and

the defendants ought not to be permitted to make such a claim. Having in his bill set up a title to recover founded on an agreement with the city (Rec., p. 67, fol. 148), he can recover only on that agreement.

(b.) The contractors having taken the bonds without objection, there remained, if anything, only a mere right to sue for breach of covenants, which cannot be assigned.

Greenby *vs.* Wilcocks, 2 Johns., 1, it was held that the assignment of a broken covenant conveys no right of action.

Story Eq. Jur., 1040 g, "although equity gives effect to assignments of choses in action, the assignor must have some substantive possession, and some capability of personal enjoyment, and not *a mere naked right* to overset a legal instrument, *or to maintain a suit.*" (See note 5 to 1040, g.)

When Brown & Co. bought the contract in May, 1868, they knew all the facts, and if the warranty was broken, they knew it. There is no warranty against patent, manifest and known defects.

2. But neither original contractors nor assignors ever ever had any such claim.

(a.) The agreement of the city was to pay for the work—in a certain way, indeed, but the agreement was to pay for the work; if the debt has been extinguished the contract has been performed, and no action on it will lie. The bonds were given in payment and accepted in payment. It was the intention of the parties to extinguish the debt, but if otherwise still the giving of a negotiable security suspends the right of action at least until that security be surrendered, and Brown & Co. do not offer to surrender the securities thus received.

3. The ground on which the claim is based entirely fails to support it. The passages hereinbefore cited from the cross-bill show that the claim is based upon the allegation that the city authorities represented that the bonds would be

made a first-class marketable security, and of a class that, by their hypothecation or sale, the work could be prosecuted. Now, the fact is that when the bids were opened, it was found that those of the firm of Greenlaw & Jones and the firm of Hopper & Montgomery were about equal. The finance committee recommended that the contract be given to Greenlaw & Jones, and pending the report the Council adjourned till the next day. When they reassembled next day and resumed the consideration of the matter, a communication was received from Hopper & Montgomery, dated on that day, and manifestly intended to influence the vote, to the effect that they "*had made certain arrangements to do the work without a sale or conversion of the bonds or depreciation of the city credit;*" that they had made arrangements for all the money and materials they required. And again they said: "One reason for making arrangements complete before submitting any bid was to avoid placing any of the bonds which may be issued on the market for sale. We know that our profit in entering into a contract and executing the work consists in holding the bonds and so placing them from time to time as not to depreciate them or have them offered for sale."

This being read, the report of the finance committee was rejected, and the contract awarded to Hopper & Montgomery. (Rec., pp. 113 and 114.)

Subsequently Hopper, by the consent of the city, withdrew, and Forest, McGavock & Mitchell took his place. The firm was called Forest, Montgomery & Co., and the contract was, by a vote of the board, ordered to be made with them, and was so made. (Rec., p. 115.)

This was the only bond contract, and all the damages claimed are claimed under the contract obtained and accepted by Hopper & Montgomery, with this written assurance, that the bonds would not be sold to raise means to carry on the work, and would not be placed on the market at all.

4. But there is still a stronger defense against this claim:

The bonds issued were guaranteed and secured by a sinking fund, in the sense and meaning of the contract, and so there was no breach of contract in that particular.

The words used in the contract describe the bonds to be issued. The contract is not that the city will issue bonds, and that the city will thereafter secure the bonds so issued, but that the amount due will "be paid in Memphis city paving bonds, payable in five, ten, and fifteen years, in equal proportions, with six per cent. coupons attached, payable semi-annually—principal and interest guaranteed and provided for by a sinking fund set aside for that purpose." (Rec., p. 33.)

Did the bonds issued to the contractors answer that description?

The bond contract was made on the 16th of July, 1867. The bonds used in making payments under that contract were issued under an ordinance of the 31st May, 1867, being one of "the ordinances set out in Exhibit C, to the cross-bill." (Rec., p. 356, xxiii.)

The first section authorizes the issue of $900,000, city bonds, to be denominated "paving bonds."

By section 2, it was provided that a board of three trustees should be appointed, called bond trustees, and sections 3, 4, and 5 made it the duty of the city treasurer to pay over to these trustees, weekly, one-sixth of the receipts of revenues, and made it the duty of the trustees to receive the money, to pay the interest on the bonds, and to invest the balance in the purchase of such bonds issued. (Rec., p. 111.) The board was actually appointed but did not organize. (Rec., p. 203.)

Were these provisions a sufficient discharge of the undertaking of the city?

In Judge Emmons' opinion he discusses the evidence offered by Brown & Co., to prove what would have been the value of the bond had the city performed its part of

the undertaking with regard to the sinking fund; and of course has occasion to say what was the nature of that undertaking. He says:

"They, (the witnesses for Brown & Co,) in a large degree base their replies upon the supposition that when the bonds are offered for sale the money to pay interest and principal is in the hands of a trustee awaiting their maturity. Had the city fulfilled the letter and spirit of its covenant this would not have been so. Such an assumption is untrue, and the valuation based upon it is erroneous. A sinking fund contemplates no such conditions. *An ordinance providing for a tax, its assessment at the regular time, and a deposit of the money in its own officer's hands, is all the covenant demands.*"

We submit that the ordinance of May 31, 1867, fulfils these requirements. As that ordinance is not alluded to by Judge Emmons it probably had been forgotten when his opinion was written.

We submit that the description of bonds in the contract of July 16, 1867, was intended to describe the bonds issued under the ordinance of May 31, 1867, and had direct reference to those bonds. And that the contractors dealing with city officers are chargeable with notice of the ordinance under which such officers acted. The "Memphis City Paving Bonds," spoken of in the contract, are the "city bonds * * denominated paving bonds," spoken of in the ordinance; and the rest of the description "guaranteed and provided for," is a description of the other incidents contained in the ordinance.

Second Exception.

Damages for Failure to Return the Loaned Bonds.

If it be determined that the loaned bonds should be brought into the account, at what rate are they to be charged against the defendant?

The master, in his account, has charged against the de-

fendant "damages for failure to return" the bonds, (Rec., p. 348,) and in his report he says he finds the value of the bonds at the maturity of the loan to be *fifty cents on the nominal dollar, with interest thereon, and for the interest paid by the city on such bonds.*"

Now, whatever be the market value of the bonds as between third parties, the value to the city is the face of the bond. The market value is no criterion of what the city could buy them for. That market value depends on the fact that the city is not paying her debts, and while she is not paying, the bonds are sold in the market at low prices. But the effect of her buying would have been entirely different from that of ordinary purchases. So long as they passed from hand to hand their value would remain unchanged; but every bond that Memphis bought would increase the value of those she had yet to buy. She would not be purchasing, but paying her bonds, and their value would necessarily have appreciated. Whatever be the value of a note or bond to others, to the maker it is always par, for he cannot honestly have any money so long as it remains unpaid.

In Memphis and L. R. R. R. Co. *vs.* Walker, 2 Head., 467 and 468, the defendant claimed to set off at par an obligation of the company to pay him $5,000 in its bonds, which the company resisted because its bonds were not worth par. The court said: "In the negotiation between the parties the bonds were treated as being at their nominal value of $5,000. *To the plaintiff* (the railroad company) *they were equivalent to that value, because their delivery was to extinguish a fixed indebtedness of the company to that amount,* and to the claimant they were *prima facie* of equal value, because they were to bear interest at the legal rate until paid." "In an action against the company founded on the liability to deliver the bonds, the proper measure of damages would be the nominal value of $5,000 and interest."

Third Exception.

Discount on Balance of Bonds Overpaid on Bond Contract.

The master finds that whereas the city was indebted to Taylor, McBean & Co. and T. E. Brown & Co. in the sum of $166,407.17, payable in bonds, the city overpaid the parties to the amount of $55,334.83, and that it was agreed that this amount of bonds should be retained by Brown at fif y-two cents on the dollar.

What is the evidence of this agreement? The master refers to the testimony of Brown, Rec. 18; Ballard Int. 9. Brown's testimony is found in the printed transcript p. 278, and Ballard's at p. 258.

Brown, (Rec., p. 278,) testifies that near the close of the work "there was a balance due from the city to us on the cash contracts of about $30,000 for work not embraced in the bills against property owners. There was also due on the bond account from the contractors to the city about $50,000 in bonds. It was agreed between the city and contractors that the city should pay as much of the cash balance against them as the balance of bonds would amount to at fifty-two cents on the dollar, the then market value of the bonds being about fifty cents." On cross-examination, (Rec., p. 281,) "the agreement above referred to that the city should pay as much of the cash balance against them as the balance of bonds would amount to at fifty-two cents on the dollar, was made by me with Mayor Leftwich in the presence of Col. Ballard and Mr. Morgan. * * I cannot positively assert that there was ever any action of the board authorizing this agreement. I do not suppose that the action of the board was at all necessary, as all the agreements were made with the mayor and city attorney, principally the mayor. I suppose whatever they did was authorized by the board."

In Ballard's testimony, his answer to int. 9 is found at pp. 261–2 he says that about the close of the work, the city

was short on cash account about $30,000, and had unpaid on bond account about $54,000," and by agreement between T. E. Brown & Co. and Mayor Leftwich this balance of bonds were taken by the contractors from the city at fifty-two cents on the dollar, crediting the city on their cash account. The contractors made this entry. I do not know whether the city did or did not, but do know that it was fully agreed upon and clearly and fully understood between the parties."

We submit that upon such slight and insufficient evidence an admitted debt due the city is not to be given away. Whatever may be the extent of the authority of the city officers to sell bonds at less than par, surely when bonds have been taken at par, (and all bonds taken under the contract were to be taken at par,) and entered in the accounts as so much money, without any agreement as to the mode of payment of the balance that might be due on either side, it was not competent for the city officers to forgive half the debt, as it is claimed they did. It is not pretended that there was any receipt or release given for the amount due by the city, and the abatement, if in truth it was agreed on, was without any consideration whatsoever and should not be enforced.

We do not find it stated what amount of bonds forms the basis of the master's assessment of damages for failure to form a sinking fund. If he assessed a percentage on all tha were issued then an allowance has already been made to make these bonds equal to par.

Fourth Exception.

Discount of $12,000 *Bonds Issued June* 8, 1868.

The delivery of these bonds appears to have been under an agreement that Brown was to be charged only sixty cents on the dollar for them. (See Ex. K to bill of the city, Rec., p. 12.)

Fifth Exception.

Amount of paving bills not paid by the property owners, and now charged against the city.

The agreement between the city and the contractors was that the contractors were to receive from the property holders one-half the amount assessed against them in cash, and the residue in thirty, sixty, and ninety days, and the owners were to give their notes, secured by a lien on their property.

But it was also provided that accounts should be made out against the property holders and delivered to the contractors for collection; "and if not paid according to the terms above specified within ten days after said payment becomes due, said accounts * * * shall be placed in the hands of the city attorney for collection under the city charter."

And then follows this clause: "The city of Memphis will and does hereby guarantee to the contractors the payment of said accounts as so assessed against the property owners," &c. (Rec., p. 25.)

The provision that if not paid the accounts should be placed in the hands of the city attorney for collection, would be out of place in the contracts in question if the liability of the city became absolute at the end of ten days. If such had been the intention the provision would have been that the accounts should be turned over to the city, without more, leaving the city to pursue what course she pleased. The presence in the contract of a provision for suing on the accounts indicates that the contractors had an interest in the suits. And we accordingly understand that the accounts were to be held for ten days by the contractors, and if not paid were to be placed by the contractors in the hands of the city attorney, to be put in suit for the use of the contractors.

Such seems to have been the contemporaneous construc-

tion of the contract by the parties, for, in fact, when the paving accounts became due and remained unpaid, the contractors employed their own attorneys to collect them by suit. The defendant says this was because the city attorney was unable to attend to the business, and declined to do so. But supposing the defendant's counsel merely stands in the place of the city attorney, the question is to whom would the paving bills belong if they had been turned over to the city attorney; to the city or to the contractors? If to the latter, it would indicate that they must exhaust their remedy before having recourse to the city.

The idea that the contractors expected the city to pay for the paving in front of private property within ninety days if the property owners did not do so, is simply absurd. Such a thing could not have entered into the contemplation of either party. Yet it is upon this idea that the master bases his view of the injustice of the release of the 20th of November, considering it as an evasion by the city of an unquestioned and admitted liability to pay the contractors on the spot half a million dollars.

Whatever may be the legal liability, it was at least a doubtful case in the minds of the parties. So doubtful that Brown, having sued on the accounts, voluntarily proposed to the city that in consideration of the loan of $175,000 in bonds, he would release the city from its guarantee, unless the courts of last resort should decide that the property owners were not liable. This proposition originated with him. He says: "I proposed, according to Colonel Morgan's advice, to release the city on the conditions specified in the loan contract of November. 1868, and thereupon the contract was entered into." (Rec., p. 281.) Colonel Morgan, it is to be noted, was then the city attorney.

But the master finds that it "was coerced from Brown & Co. in their desperate pecuniary straits; that there was

no equal consideration given for it, and that in equity and good conscience it ought not to stand." And the master proceeds to say that if it be held binding it was conditional, and the city did not comply with the condition. It loaned Brown & Co. only $140,000 bonds instead of $175,000, and gave nothing else of equal value for the residue. (Rec., p. 346.)

How did Brown & Co. get into the case?

The cross-bill says, "one of the said firm became involved for certain of the prior contracting parties, whereby it became necessary to assume such contracts." (Rec., p. 69, fol. 157.)

Ballard, who was engaged in the business from the beginning to the close, says, that Langdon had endorsed the bills of some of the partners of Taylor, McBean & Co., and the city and property owners both being in arrears, "Mr. Langdon, to save himself in the premises, was compelled either to lose a very large amount of money or associate with him Mr. T. E. Brown, forming the firm of Brown & Co., raise a large amount of money, buy out all the different firms and interests, and take the whole thing out of their hands and go on with the work." They paid Mitchell, of Forest, Mitchell & Co., some $40,000, and Taylor & McBean, for their investments, *between sixty and seventy thousand dollars, and assumed all other liabilities.* (Rec., p. 259.)

That looks very little like a man's taking a business simply to save himself.

Nor does the evidence show any danger of failure by the contractors involving Mr. Langdon's interests; with Forest, Mitchell & Co., he does not seem to have had any concern, yet he bought out their interests and paid them $40,000, which was net profit to them, for they had been paid in bonds for all their work done, $155,962.13. Bonds received, $150,000; cash from Brown & Co., $40,000. (Rec., pp. 259, 351.)

As for the other contracts, the contractors were pretty well protected by the provision that if in any one section a majority of the property holders should refuse to pay the cash assessment, the time for completing the street should be extended equal to the time of the delay in payment. (Rec., p. 25.)

Thus the contractors were sure of getting more than half cash for all the work they were compelled to do. They could stop if they were not paid.

What was the coercion?

That Brown & Co. were in straits may be admitted.

Did the city take advantage of it? The testimony of Brown, cited above, indicates that the proposition originated with him. If it did, there would seem to be an end of the matter, unless, indeed, it was a lawful ruse to get the bonds of the city in his possession. In his answer to the bill of the city, seeking to enforce the contract, he does not say it was forced upon him, but only that it was not performed. He does not intimate that he would have any cause of dissatisfaction if the contract had been performed by the city. (Rec., p. 53, fol. 105.)

The master has made a case for the defendant which he never thought of making for himself. If the rule laid down by Chancelor Kent, above cited, had been followed, and the reference to him had been confined to the allegata and probata of the parties, he would not have had the opportunity of deciding the defendant's case on this ground.

Was the agreement performed by the city?

The defendant in the answer charges, *first*, that the bonds were not delivered "as rapidly as they could be executed," and, *second*, that only $140,000 were delivered in all, and that instead of the cash $35,000 only a worthless acceptance was given.

As to the acceptance.

By papers filed at Rec., p. 295, it will be seen that as

early as July 18, 1868, four months before the making of the contract in question, a practice originated of the mayor given written notes, promises to deliver to the order of Brown & Co. so many bonds. These notes were negotiable, and the purchaser on presentation thereof to the mayor received the bonds. This practice continued till the 1st December, 1868, and in pursuance of it the mayor seems to have given a number of such notes calling for 140 bonds, all of which were issued on the return of the certificate.

But there was another for thirty-five bonds, which have never been issued. There is evidence that the bonds were demanded but not issued.

This is the default on account of which the court sets aside the release, on the ground that in cases of accord and satisfaction, compromises and releases, the consideration must be fully and accurately performed, and that an unjust agreement will not be specifically enforced. And the court starts out on this branch of the subject with the statement that "the proof shows that at such date the city irrespective of all consequential damages, owed the contractors one-half a million dollars, and that they were in great financial distress in consequence of the refusal of the city to comply with its contracts."

We submit that the case on the record is no such case as the circuit court assumes it to be, but an entirely different one.

The city was a guarantor only. The contractors could not recover from both city and property owners. They were already suing the property owners. If they recovered they were sure of their money, for the amounts taxed were levied on the property and were necessarily but a fraction of its value. They had also, it is said, a right to sue the city, but there was no possible motive for so doing if they could recover against the property owners. Under this state of facts the contractors agreed not to sue

the city until the question of the liability of the property owners was determined, and if they were held liable by the court of last resort then to release the city entirely, otherwise the city to remain liable.

This looks like a reasonable and fair arrangement. If the city had had the half million in its treasury and would not pay, the case might have been different, but the defendant has introduced ample evidence to prove that it could not pay $5,000 in cash, or any cash; that its very clerks were paid in scrip. The court and master in their warm indignation against the city for failing to deliver the thirty-five bonds do not consider it worthy of notice that at that very time the contractors had in their hands fifty-five bonds which they had been permitted to overdraw on their bond contract.

To hold either party with such extreme strictness when the course of dealing between them has been so loose is hardly equitable. The dealings of the parties themselves offered the best rule in judging of what is required of each other.

Should the court fail to find the contractors entitled to take the 55 bonds, at fifty-two cents on the dollar, then the contractors will have had more bonds than they were entitled to and the whole defense fails.

If the decision on this question be against us, and if the contract be held not to suspend the right of action on the whole $431,000 of paving bills, it should, we think, operate pro tanto, and suspend the right of action on 140–175ths of that amount, or at least on an amount of paving bills equal to the bonds loaned on both contracts $239,000.

Sixth Exception.

Attorneys Fees and Expenses of Collection Incurred by Contractors.

Seventh Item.

Discount on $40,000 *Scrip.*

The city issued to the contractors four warrants of $5,000 each, $20,000, July 10, 1867; two warrants of $5,000 each and one of $2,000, making $12,000, August 15, 1867; and seven warrants of $1,000 each, making $7,000, September 9, 1867; and one of $1,000, December 24, 1867. (Rec., pp. 12; fol. 38 and 48, fol. 80.)

The master credits the first $39,000 at $17,322.50, and the remaining $1,000 at $500. (Rec., pp. 350, 354.)

The evidence he refers to as authorizing this is as follows:

Hoy's dep., Rec., 290. Y Y and Z Z, Rec., 292. Bridge's dep., Int. 19, Rec., p. 199; Cross-int. 6, Rec., p. 201. Lofland, int. 7, 8, 9, Rec., p. 183; Int. 13, Rec., p. 184. Taylor, int. 7, Rec., p. 234. Salter int. 7, Rec., p. 243. Ballard, int. 9, Rec., 261. Baldwin, int. 9, Rec., p. 250.

The entries in the city books cited to support the credit of the discount make it only $21,677.50, and the net proceeds $18,322.50. (Rec., pp. 292, 295.)

Conclusion.

We submit that the decree should be reversed, and the cause remanded for further proceedings in accordance with the principles and rules of equity.

J. D. McPHERSON,
J. M. CARLISLE,
for Appellnnt.

Supreme Court of United States,

DECEMBER TERM, 1873.

No. 226.

The City of Memphis
vs.
Talmadge E. Brown and others.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS, AND BRIEF OF ARGUMENT FOR THE CITY.

WM. M. RANDOLPH, of Counsel.

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1873.

No. 236.

The City of Memphis
vs.
Talmadge E. Brown and others.

STATEMENT OF THE CASE FOR THE CITY.

CASH CONTRACTS.

In the year 1867, certain persons, associated under the firm name of Taylor, McBean & Co., entered into contracts with the City of Memphis to furnish all the necessary materials and labor, and to regulate and pave with the "Nicolson pavement" the carriage way of portions of Madison, North Court, South Court, Second, Adams, and Union streets in the city, and to lay and relay the curb-stones required.

As compensation, Taylor, McBean & Co. were to receive certain specified prices for the work done, to be paid them on completion of each section, by the owner, or owners of lots fronting the street on which the work was done, one-half in

cash, and the other half to be paid in thirty, sixty and ninety days, for which the owner or owners were to give their notes, with the lien fixed by the city charter, retained in the notes.

The city was to pay for the work at the intersections of the streets and alleys, and in front of the public grounds, upon the same terms as those agreed upon for the property owners for the pavement in front of their property.

By the contracts the accounts for the pavement laid down were to be made out upon the completion of each section, by the City Engineer, against the property owner or owners, and delivered to Taylor, McBean & Co. for collection, and if not paid according to the terms of the contracts, within ten days after the payments respectively became due, the accounts, or those unpaid, were to be placed in the hands of the City Attorney for collection, under the city charter.

The contracts then contained the following provision:

"The City of Memphis will and does hereby guarantee to the contractors the payment of said accounts, as so assessed against the property owner or owners for the pavement, according to the plans and specifications."

The city, by the contracts, was to secure the privilege of using the "Nicolson pavement" (which was patented), at a charge to Taylor, McBean & Co. of fifteen cents per superficial yard, to be deducted by the city from the cost of any work done by Taylor, McBean & Co., for which the city had to pay them, *i. e.*, the work done at the intersections of the streets and alleys, and in front of the public grounds.

See printed records, pages 16–26, and pages 84–92.

There is no stipulation in the contracts by which the city agreed to pay for any pavement except that at the intersections of the streets and alleys, and in front of the public grounds. The city's liability for the pavement laid down in front of private property depends upon the guaranty clause before copied.

The contracts just mentioned are known in the record as the "cash contracts," to distinguish them from the contracts mentioned below, which are styled the "bond contracts."

The provisions of the charter and ordinances of the city under which the above contracts were made are as follows:

From Memphis City Ordinances for 1867, pages 214–216.

CHARTER.

"SECTION 50. The General Council shall have power to require that the cost of grading, paving and repairing sidewalks, curbing and gutters alongside included, and of paving the entire carriage-way, gutters included, of any street, or any portion of any street or alley, shall be borne by the owners of the adjoining property, and in such manner and with such material as the General Council may determine; and whenever the General Council may deem it necessary, and also where the owners of the major part of the lots fronting on any street may petition for grading and paving the same, they shall cause such grading and paving to be done in such manner as they may prescribe by ordinance, and the costs of such grading, paving, repairing and repaving, shall be borne by the owners of the adjoining property, and shall be apportioned and charged on the abutting lots in proportion to their respective front, and shall be paid by the owners of such lots respectively; and all such work shall be done under the control of the City Engineer, by direction of the General Council, and shall be let out by the said Council to the lowest and best responsible bidder, under such guard, restrictions and regulations as they may prescribe by ordinance. So soon as any contract for grading, paving or repairing any street or alley, or portion thereof, shall have been made, the General Council shall proceed to levy and assess upon each lot bordering or abutting the said street or alley proposed to be improved, such a proportionable sum as shall make up the entire cost and expenses of said improvement opposite the same, to the center of the street, and shall fix the time within which the same shall be paid, the number of installments, and the amount to be paid at each of such installments, and thereupon the City Engineer shall make out and deliver to the City Attorney, for collection,

the accounts for such apportioned costs of the improvements, and the owners of the lots charged therewith shall be bound to pay said costs like liabilities contracted by themselves, and may be sued therefor; but the lots shall also be held for the respective apportioned share of such costs until the same, with interest and costs of collection, be fully paid off; and a special lien on said lots is hereby given for such apportioned charges and costs; provided, however, that on all streets where street railroads are operated the said railroad company shall be required to grade and pave, as required by ordinance, so much of said street as is between the rails and two feet outside thereof, and on failure or refusal to do said work in the time and mode required by ordinance, the City Engineer shall proceed to have the same done, and the costs thereof shall be collected as provided in the case of private individuals, and shall be a lien on the property of said railroad."

ORDINANCE DIRECTING STREETS TO BE PAVED.

"*Be it ordained by the Board of Mayor and Aldermen of the City of Memphis:*

"SECTION 1. That the following named streets, to-wit: Main, from Auction to South; Second, from Auction to Beal; Poplar, from Front to Town Reserve; Adams, from Front to Town Reserve; Jefferson, from Front to Charleston avenue; Charleston avenue, from Adams to Madison; Madison, from Front to the railroad bridge; Pigeon Roost road, from Madison street to Town Reserve; Union, from Front to intersection with Pigeon Roost road; Beal, from Front to intersection with Pigeon Roost road; Front, from Union to South; Third, from Market to Union—shall be paved with what is known as the Nicolson pavement, and that the Mayor is hereby directed to advertise for twenty days in the city papers for proposals for grading, rounding and paving the whole or part thereof, according to the plans and specifications in the Engineer's office; and the Mayor and the Fi-

nance Committee of the Board of Aldermen are hereby authorized to make and enter into such contract or contracts with the lowest responsible bidder, as to payments, time of completion, and under such restrictions as they may think best.

"SEC. 2. Immediately after the passage of this ordinance, the City Civil Engineer shall forthwith proceed to make a plat of said streets, as described in Section 1, and a plat of the lots bounding and abutting the same; and shall by actual measurement ascertain the number of feet front on each lot bounding and abutting the said streets; and shall mark upon his plat the names of the owners of such lot and the number of feet belonging to each, and make such proper explanatory marginal notes and remarks as will designate each lot, its size, shape, number and ownership. And if the name of the owner or owners cannot be ascertained by him, he shall mark upon such lot the words "owner's name unknown," which said plat the City Engineer shall complete without delay, and retain the same in his office for the inspection of all concerned. He shall also prepare and lay before the Board of Mayor and Aldermen at their first meeting after a contract shall have been made by them for the grading, constructing and paving of the street, gutter or alley upon which such lots front or abound, an estimate of the entire cost and expenses of said improvement under the contract aforesaid, as shall be opposite the respective lot or lots, from the sidewalk, including the gutters, to the center of the street, and shall mark upon said lot the amount thereof; and such amounts are hereby declared to be a special tax upon such lots respectively, and a debt due by the owners thereof in such installments as the Board of Mayor and Aldermen may determine; and he shall make out and deliver to the Attorney for the city a list of the owners and the amounts due respectively, with the number of the lot and time of payment, and the Attorney shall proceed to collect the same, and in case the owners shall fail to pay on demand, to enforce the lien against the lots given by the charter of the city.

"SEC. 3. That all street and alley crossings and intersec-

tions shall be paved by the city, according to the plat of the City Engineer.

"SEC. 4. The City Civil Engineer shall notify the street railroad companies operating on any of the streets required to be paved, to have their portion of the street paved simultaneously with the progress of the work on either side of their road-bed; and in case of their failure so to do, he shall require the contractor with the city to complete the same at the same rates paid by the city.

"SEC. 5. There shall be a standing committee, appointed as other committees, consisting of three members of the Board of Aldermen, called Committee on Street Paving, and two citizens owning property upon the street to be paved, all of whom shall constitute said committee, whose duty shall be to give assistance to the City Engineer in the execution of the contract for paving said street or alley, and who shall, at stated times, during the progress of said paving, make reports to the Board of Mayor and Aldermen of the progress of said work and the condition of the same.

"SEC. 6. All ordinances in conflict with this are repealed."

ORDINANCE DIRECTING PAVING OF OTHER STS.

"*Be it ordained by the Mayor and Board of Aldermen of the City of Memphis:*

"SECTION 1. That the ordinance passed December 18, 1866, providing for the pavement of sundry streets of the city with the Nicolson pavement, be and the same is hereby amended so as to embrace the following streets, to-wit: DeSoto street, from Madison to South street, and Old Madison street, from Bayou bridge to Charleston avenue.

"SEC. 2. That the Mayor be and is hereby authorized to advertise for twenty days for proposals to pave with the Nicolson pavement Main street, Poplar street, Jefferson street, Beal street out to DeSoto street, DeSoto street, Shelby street, Old Madison street and Charleston avenue; payment for the work to be made with city six per cent. bonds, to be guaranteed by a sinking fund provided for the purpose."

Be it ordained by. the Mayor and Board of Aldermen of the City of Memphis:

"SECTION 1. That a tax of $10.68 per foot front be and the same is hereby levied and assessed upon lots or parts of lots fronting on each side of Second street, from Auction to Beal, and upon each side of Adams street, from Front street to the corporation line on the east.

"SEC. 2. That a tax of $10.65 per foot front be and the same is hereby levied and asssesed upon all lots fronting on each side of Madison street, from Front street eastwardly to the Charleston railroad bridge.

"SEC. 3. That a tax of $10.68 per foot front be and the same is hereby levied and assessed upon all lots fronting upon each side of Union street, from Front street to Bayou Gayoso, and a tax of $7.23 per foot front on all lots on each side of said street, from Bayou Gayoso eastwardly.

"SEC. 4. The said tax, as above provided for, to be for the purpose of paying for all the expenses incurred (curbing excepted) in paving said streets with the Nicolson pavement, contracted for with Taylor, McBean & Co., under date of March, 1867.

"SEC. 5. That an additional tax of one dollar and sixty cents per front foot be and the same is hereby levied and assessed upon all lots fronting on each side of the streets above mentioned, for the purpose of paying for the laying down of new stone curbing in connection with the pavement of the same with said Nicolson pavement. Provided, however, that only twenty-five cents per foot front shall be collected in cases where old curbing has been reset only.

"SEC. 6. That the tax above provided for shall be, and the same is hereby, made due and payable as follows: Upon the completion of each section of the pavement, of not less than 375 feet nor more than 400 feet, one half the tax assessed shall be paid in cash, and equal notes executed for the balance due, and payable in thirty, sixty and ninety days from date, the said cash payment and notes to be made and delivered to any one duly authorized by contract or otherwise to receive the same."

BOND CONTRACTS.

In the same year, 1867, contracts were made between the city and certain persons associated under the firm name of Forrest, Montgomery & Co., to furnish all the necessary materials and labor, and to regulate and pave with "the Nicolson pavement" the carriage-way of portions of Jefferson, Shelby, DeSoto, Beal, Poplar, Old Madison and Main streets and Charleston avenue, and lay and relay the curb-stones required.

As full compensation for the work to be done, Forrest, Montgomery & Co. agreed to receive certain prices, specified in the contracts, to be paid by the city for each section upon its completion "in Memphis City Paving Bonds, payable in five, ten and fifteen years, in equal proportions, with six per cent. coupons attached, payable semi-annually, and the principal and interest to be guarantied and provided for by a sinking fund set aside for that purpose, and the bonds to be taken at par."

A deduction of twenty-five cents for each yard of paving was to be made by the city, and allowed by Forrest, Montgomery & Co., for the purpose of paying for the privilege of using the "Nicolson pavement," which had been secured by the city for them.

No payment was to be made under the contracts until the work was fully completed, and so certified by the City Engineer, and endorsed by the Mayor, and then "the whole of the moneys accruing under the contracts, except the portion agreed to be retained, was to be paid."

Taylor, McBean & Baldwin, a firm composed of the same persons as Taylor, McBean & Co., became the assignees of the contracts made with Forrest, Montgomery & Co., which firm in the meantime had changed its style to Forrest, Mitchell & Co., and undertook and agreed to perform them in their stead.

The transfer, to be seen in the printed record, p. 119, merely substituted Taylor, McBean & Baldwin for Forrest, Montgomery & Co., or Forrest, Mitchell & Co., in the remaining or unfinished contracts of Forrest, Montgomery & Co. So far as Forrest, Montgomery & Co. had complied with their contracts, no transfer was made. The formal transfer to be found in the

printed record, p. 312, is fuller, and may include all the contracts made with Forrest, Montgomery & Co.

Subsequently, about the 15th day of October, 1867, the contracts made with Forrest, Montgomery & Co. were modified by agreement between the city and Taylor, McBean & Baldwin, so that the prices of the work to be done in front of private property were to be assessed and collected in cash from the property-holders whose property abutted the said streets, in the manner and form prescribed in the contracts with Taylor, McBean & Co.

The modification also made a change in the prices of the work to be done, based upon the supposed difference in the value of bonds and cash. The extent of the change sufficiently appears by giving the prices as to one street, *before* and *after* the modification:

MAIN STREET.

Before Modification in bonds.		*After Modification in cash.*	
Paving per square yard.....	$5 35	Paving per square yard.....	$3 95
New curbing per lineal foot...	1 75	New curbing per lineal foot..	1 60
Curbing reset per lineal foot....	0 20	Resetting curbing per foot.....	0 25
		Removing dirt per surface y'd	0 40

The changes as to the other streets were in about the same relative proportions.

The modification of the contracts made with Forrest, Montgomery & Co. contained no clause by which the city guarantied the payment of the paving accounts as assessed against the property owners, similar to that contained in the contracts with Taylor, McBean & Co.

See the modification in the printed record, pages 34—35.

There was, of course, no guaranty clause in the original "bond contracts," as the city was to be the only party liable for the work done under them.

The paving in front of the city's and public property, and at the intersections of streets and alleys, was to be paid for by the city in bonds, under the contracts with Forrest, Montgomery & Co., and no change in the contracts in that respect was made.

The provisions of the charter and ordinances of the city, under which the contracts with Forrest, Montgomery & Co. were made, are as follow:

From Memphis City Ordinances for 1867, p. 223.

CHARTER.

"The Board of Mayor and Aldermen shall also have power, for the purpose of making any public improvement that may be deemed necessary for the city, or of acquiring any property for the public use of the city (or to fund the debts now due or to become due in the city), to issue the bonds of the city, bearing interest not to exceed six per centum per annum, and having not more than thirty years to run; but this authority shall not be exercised unless the ordinance authorizing the same shall first be submitted to a vote of the qualified voters of the city, at an election to be held for the purpose, and after giving ten days' notice of the time and place of election, in all the daily newspapers published in the city, and if a majority of those voting shall decide against the proposition, the bonds shall not be issued."

The charter also contained a provision that the Mayor and Board of Aldermen might provide by ordinance for the paving of all the streets of the city, by the owners of the real estate fronting thereon, and enforce the same by fines and forfeitures; and should the owners fail to comply with the requirement, the Mayor and Board of Aldermen might contract for the paving, and pay for the same, and the payment thus made was to be a lien in favor of the city, and might be enforced by suit.

Ordinances of 1867, pp. 212-214.

ORDINANCE

Authorizing issue of paving bonds, as ratified by the voters (printed record, pp. 110–111).

"SECTION 1. That there shall be issued city bonds, with interest coupons attached, to the amount of $900,000, for the

purpose of paving the streets and alleys of the city, and which shall be denominated "paving bonds."

"SEC. 2. A board of three trustees shall be appointed by the Mayor, with the advice and consent of the Board of Aldermen, to be called the "Bond Trustees," and who shall be appointed to serve until January, 1869, 1870 and 1871; the term of service of each to be determined by lot.

"SEC. 3. It shall be the duty of said Board of Trustees to receive such portion of the revenue of the city as shall be paid them by the City Treasurer, and to disburse the same in the following manner: 1st. To pay the interest on the bonds herein provided to be issued, as the same becomes due. 2d. To invest any balance on hand in the bonds themselves, at their market value, and to return the bonds and coupons thus retired to the City Comptroller, who shall cancel the same.

"SEC. 4. The City Treasurer shall pay over weekly to said Board of Trustees one-sixth of his receipts from revenue, beginning on the second Tuesday in January, 1868, and continuing until the sum of $——— shall have been paid.

"SEC. 5. Said Trustees shall each enter into bond in the penal sum of $—— for the faithful discharge of the duties prescribed in this ordinance, and shall receive for compensation such salary as shall be allowed by the Board of Aldermen.

"SEC. 6. At least five days after the final passage of this ordinance, the Mayor shall, by proclamation, order an election to test the sense of the qualified voters of the city of Memphis as to the issuance of the amount of paving bonds provided for by this ordinance, in accordance with the provisions of the city charter."

ORDINANCES

Directing the paving of the streets, and making the assessments (printed record, pp. 116–117, 119–120, 122).

STREETS TO BE PAVED.

"That the property owners fronting upon the following streets in the city, to-wit: Main, from Auction to South; Pop-

lar, from Front to the corporation line; Jefferson, from Front to the Memphis and Charleston depot; Beal, from Shelby to Wellington; DeSoto, from Madison to South; Shelby, from Union to South; Charleston avenue, from the bayou to Memphis and Charleston depot; Old Madison, from the bayou to Memphis and Charleston depot—that they pave said streets from sidewalk to center on each of said sides with Nicolson pavement, according to specifications in Engineer's office, except upon streets over which runs the street railroad. Upon those streets said owners will pave to within two feet of said track, and upon said streets said railroads will pave within said tracks and two feet on each side, on or before the first day of September, 1867. Also, owners on the following streets, to-wit: Second, from Market to Beal; Adams, from Front to corporation line; Union, from Front to Wellington; the north and south sides of Court Square, with the Nicolson pavement; Front, from Market to Union street, and the alleys from Front to Main, and Main, from Market to Union street, between Front and Main, with stone, according to specifications in Engineer's office, by the 22d of August, 1867, and in default the city will do the same at their cost."

"*Be it ordained, etc.*, That the paving ordinance be so amended as to include Monroe, from Front to Second street, and that said street be paved by Taylor, McBean & Co. with Nicolson pavement, on the same terms and conditions as the other streets now under contract by them. Also, Pigeon Roost Road, from the railroad bridge to the corporation line."

MAKING ASSESSMENTS.

"SECTION 1. The property owners on the streets hereafter mentioned, having failed to pave the same as directed by ordinance, and said streets now being under contract for pavement by the city, in order to assess said cost against the property owners, the following specified assessment, or so much thereof as may be necessary, be, and the same is hereby levied and assessed upon each foot of all lots fronting on each side of the following named streets, to cover said cost of paving by the city:

"Seven dollars and seventy-eight cents ($7.78) on the north side of North Court street and the south side of South Court street, from Main to Second; and ten dollars and sixty-eight cents ($10.68) on Adams and Union streets, from Front street to the public wharf.

"SEC. 2. That said tax be for the purpose of paying for all expenses incurred (curbing excepted) in paving said streets with the Nicolson pavement contracted for by Taylor, McBean & Co.

"SEC. 3. That an additional tax of one dollar and sixty cents ($1.60) per front foot be assessed when new curbing shall be laid, but only twenty-five cents shall be collected where old curbing shall be reset by contractors.

"SEC. 4. That the taxes above provided for shall be, and the same is hereby made due and payable, as follows: Upon the completion of each section of the pavement of not less than three hundred and seventy-five feet nor more than four hundred feet, one-half of the tax assessed shall be paid in cash, and equal notes executed for the balance, due and payable in thirty, sixty and ninety days from completion of section. Cash payments and notes to be made and delivered to any one duly authorized, by contract or otherwise, to receive the same."

"SECTION 1. The property owners on the streets hereafter mentioned, having failed to pave the same as directed by ordinance, and the said streets now being under contract for pavement by the city, in order to assess said cost against the property owners, the following specific assessment, or so much thereof as may be necessary, be, and the same is hereby levied and assessed upon each front of all lots, or parts of lots, fronting on each side of the following named streets, to cover said cost of paving by the city:

"Eighteen dollars and sixty-nine cents ($18.69) on Main, from Auction to South; twelve dollars and twenty-five cents ($12.25) on Shelby, from Union to South; fourteen dollars and eight cents ($14.08) on Poplar, from Front to Boundary avenue; thirteen dollars and ninety-five cents ($13.95) on Jefferson, from Front to Charleston avenue; thirteen dollars and twenty-

six cents ($13.26) on Beal, from Shelby to DeSoto; sixteen dollars and fifteen cents ($16.15) on the east side of Charleston avenue, and twelve dollars and eleven cents ($12.11) on the west side, from Adams to New Madison street; thirteen dollars and eighty-two cents ($13.82) on Old Madison, from Old Madison to Charleston avenue; ten dollars and sixty-four cents ($10.64) on DeSoto, from Madison to Union, and nine dollars and thirty-five cents ($9.35) from Madison to South.

"SEC. 2. The tax, as above provided for, to be for the purpose of paying for all expenses incurred (curbing excepted) in paving said streets with the Nicolson pavement contracted for with Forrest, Montgomery & Co., under date of July 16, 1867.

"SEC. 3. That an additional tax of one dollar and seventy-five cents ($1.75) per Front foot be and the same is hereby levied and assessed to pay for the new stone curbing laid in connection with above pavement; provided, however, that only twenty cents (20 c.) be collected where the old curbing is reset.

"SEC. 4. That the taxes above provided for shall be and the same is hereby made due and payable as follows: Upon the completion of each section of the pavement of not less than three hundred and seventy-five feet nor more than four hundred feet, one-half of the tax assessed shall be paid on the completion of the section, the other half in sixty days therefrom; payment to be made to any one duly authorized by contract or otherwise to receive the same, upon bills made out and approved by the City Engineer."

"SECTION 1. The property owners on the streets hereinafter mentioned, having failed to pave the same as directed by Ordinance, and said streets now being under contract for pavement by the city, in order to assess the costs against the property owners, the following assessment, or such thereof as may be necessary, be, and the same is hereby levied and assessed upon each front foot of all lots or parts of lots fronting on each side of the following named streets, to cover said cost of paving by the city: Fifteen dollars and four cents ($15.04)

on Main, from Auction to South; eleven dollars and sixty cents ($11.60) on Poplar, from Front to Boundary Avenue; ten dollars and ninety cents ($10.90) on Beal, from Shelby to DeSoto; ten dollars and sixty-six cents ($10.66) on Shelby, from Union to South; eight dollars and sixty-three cents ($8.63) on DeSoto, from Madison to Union; seven dollars and sixty-three cents ($7.63) on DeSoto, from Union to South.

"SEC. 2. The tax above provided for to be for the purpose of paying for all expenses incurred (curbing excepted) in paving said streets with the Nicolson pavement, contracted for with Taylor, McBean & Co., under date of October —, 1867.

"SEC. 3. That an additional tax of one dollar and sixty cents ($1.60) per lineal foot be, and the same is hereby levied and assesssed to pay for the new stone curbing laid in connection with the above pavement; provided, however, that only wenty-fivecents (25c) be collected where the old curbing is reset.

"SEC. 4. That the tax above provided for shall be, and the same is hereby made due and payable as follows: Upon the completion of each section of the pavement, if not less than three hundred and twenty-five feet nor more than four hundred feet, one half of the taxes assessed shall be paid in cash, the other half in thirty, sixty, and ninety days therefrom; payment to be made to the contractors or their agents, upon bills made out and approved by the City Engineer."

The last ordinance was passed after the modification of the "bond contracts," already noticed.

TRANSFER OF CONTRACTS TO T. E. BROWN & CO.

About the sixth day of May, 1868, Taylor, McBean & Co., and Taylor, McBean & Baldwin transferred to T. E. Brown & Co. all the contracts made with the city for laying the Nicolson pavement, including as well those made with Taylor, McBean & Co., as those made with Forrest, Montgomery & Co.; and all claims for money due or to become due from the city, or the property owners, and for damages against the

city, or the property owners, accrued or to accrue, by failure to comply with the contracts, with the right to sue for and recover the same.

The transfer may be seen in the printed record, pp. 312-313, and its recognition by the city at p. 121.

The work contracted to be done by all the different contractors was done, and was inspected and accepted by the city, and no question arises in the case in reference to its not being a compliance with the contracts.

PAYMENTS BY THE CITY.

The city paid in cash, or its equivalent, according to the accounts, for work done under the contracts originally made with Taylor, McBean & Co., or the "cash contracts," $94,720.96.

But a note of the city for $20,000.00, included in the above payments, was returned, and the amount of the payments ought to be decreased by that sum.

Printed record, pp 4 and 16.

In the above payments a payment made in the city's bonds, amounting nominally, to $12,000.00, is charged to T. E. Brown & Co. at only $7200.00, while the city claims that the amount of the charge ought to be the full $12,000.00, thus increasing the payments by $4800.00.

Printed record, pp. 4-5.

This claim was rejected by the Master in his report.

Printed record, p. 350

And the city filed an exception to his action.

Printed record, p 369.

Among the said payments is also included one of $40,000.00 in city scrip, or warrants, being orders directed to the Treasurer, signed by the Mayor, and countersigned by the Comptroller, directing the payment to the bearer of so much money, which the city charges to T. E. Brown & Co. at the face, while T. E. Brown & Co. claim that they sold the scrip

or warrants in the market for full value, and suffered a loss of $21,667.50, and that the loss ought to be sustained by the city, and the payments decreased that much.

Printed record, pp. 5, 12, 48, 51.

The Master charged T. E. Brown & Co. only with the proceeds of the scrip as sold in the market.

Printed record, p. 350.

And the city filed an exception to his action.

Printed record, p. 368.

The proof shows that the city never officially authorized or ratified the payment to Taylor, McBean Co., or T. E. Brown & Co. of scrip or warrants at the market value, or anything less than face.

Printed record, pp. 202, 209, 313-314, 314-316

Though it appears that the Comptroller in one instance credited T. E. Brown & Co. by discount on the scrip, the amount being probably the whole discount claimed.

Printed record, pp. 12, 15, and 291.

And the proof is equally clear that the city never officially authorized or ratified the sales of its bonds or their payment to Taylor, McBean & Co., or T. E. Brown & Co., for less than their face.

Printed record, pp. 201, 210-211, 314

Though it also appears as to the bonds, that the Comptroller in one instance charged T. E. Brown & Co. with $7200.00 as the proceeds of $12,000.00 of the city's bonds.

Printed record, pp. 12, 15, and 291.

The total amount of the work done under the cash contracts for which the city was primarily liable, was at its completion $74,731.39.

Printed record, p. 12.

There appears to be a discrepancy between this amount and the amount as given by the City Engineer in his agreed statement, which is $86,769.68.

This discrepancy is probably capable of explanation, but as it is not very material here, no further notice will be taken of it. It may be that in the city's account, the charge for royalty has been deducted from the Engineer's estimate.

Printed record, 307–308.

The Master in his report states the amount at $80,116.26.

Printed record, p. 351.

But the city claims the right to deduct from the above sum one cent for royalty on each yard of pavement laid down after the 8th day of August, 1868.

The city purchased the royalty from the assignee, whose right expired on the above day.

The work, by the contracts, ought to have been done before the day.

Part of it was not done till afterwards, and upon that part the owner of the patent for the Nicolson, after August 8th, 1868, required one cent more than the owner before that date had required.

The amount of increase of price was $4,782.47, and the city claims that T. E. Brown & Co. are liable for it, because it resulted from their not completing their contract within the time stipulated.

Printed record, pp. 4, 9–10, 15.

The Master in his report disallowed this claim.

Printed record, p. 356.

And the city filed an exception to his action.

Printed record, p 375.

According to the city's statement of the account, T. E. Brown & Co. have been overpaid on the cash contracts $9,572.04.

Printed record, p. 15.

The aggregate amount for which the city was liable for pavement laid down under the bond contracts, prior to the 15th day of October, 1867, the day on which the modification was made, was $155,962.13.

Printed record, pp. 308, 351.

Before the modification, October 15th, 1867, Forrest, Montgomery & Co. had been paid $150,000.00 in bonds of the city for work done under the contracts as originally made with them.

Printed record, p. 290, deposition of Hoy.

The royalty on the pavement laid by them was $6,399.65.
The two sums overpaid them for the work done, $437.52.

Printed record, pp. 308, 82, 33.

The aggregate value of the paving done under the bond contracts, after the modification, October 15, 1867, in front of city and public property, for which the city was liable primarily, to be paid in bonds, was $166.407.17.

Printed record, p. 308.

The Master's report is $165.298.30.

Printed record, p. 351.

The difference is not material here.
After deducting the cost of the royalty, except the one cent per yard before referred to, and including the relaying of the Main street railway track, which was extra work, the value of the work done was $144.142.86.

Printed record, pp 5, 14—15, 308.

On account of the work so done the city paid or delivered to Taylor, McBean & Co. and T. E. Brown & Co., not including any payment to Forrest, Montgomery & Co., or Forrest, Mitchell & Co., $213.000 in its bonds.
All those bonds were delivered after the modification, fifteenth day of October, 1867.

Printed record, pp. 13—14, 15, 52, 290, 293, 302, 348.

Including $317.50 interest accrued on the bonds before delivery to T. E. Brown & Co., the bonds delivered overpaid for the work done $68,174,64.

Printed record, pp 5, 15.

The Master in his report states the amount of the overpayment at $55,834.83.

Printed record, p. 349.

The bonds were received under the "bond contracts," which, as already seen, contained an express provision that they were to be taken by the contractors *at par*.

Printed record, pages 33, 81, 34. But the Master allowed for the balance of them only 52 cents on the dollar. Printed record, page 350, and the city filed an exception to his action. Printed record page 368.

By both the "cash" and "bond" contracts, the contractors were to pay the city for the royalty of the Nicolson pavement.

Printed record, pp 25, 33, 82, 91.

The royalty for which the contractors were liable to the city, not including $6,399,65 due from Forrest, Montgomery & Co. for paving laid before the modification of the fifteenth of October, 1867, amounted as follows:

Bond Contracts	$27.265 39
Cash Contracts	14.996 92
	$42.262 31

Printed record, p. 308.

This does not include the one cent for each square yard, amounting in the aggregate to $4782.47 claimed by the city for paving done after August 8, 1868.

In his report Mitchell, the Master, allowed the city a credit for royalty, collected and uncollected, of $42.262.28, leaving in controversy only the $4782.47.

BOND LOANS.

We come next to two loans of bonds made by the city to T. E. Brown & Co., in August and November, 1868. Con-

tracts were made at the time of each loan, and may be seen in the printed record, pages 35—37.

The first loan was of one hundred thousand-dollar thirty-year bonds, with coupons for interest payable semi-annually, attached, and the second of one hundred and seventy-five like bonds, to be returned, principal and interest, at the end of eighteen months from the date of the loan.

LOAN CONTRACTS.

In the loan contract made on the twentieth of November 1868, the city's proposal to loan T. E. Brown& Co. one hundred and seventy-five thirty-year $1000 paving bonds for eighteen months, upon condition that T. E. Brown & Co. would place in hands of the City Attorney paving bills against the property-holders to the amount of the face value of the bonds, and upon the further consideration that T. E. Brown & Co. would release the city upon all liabilities upon the paving contracts, unless it should be decided by the courts of last resort that the property-holders were not liable for the pavement, the bonds and interest upon them to be returned at the end of the eighteen months, unless T. E. Brown & Co. had previously paid the interest, was accepted by T. E. Brown & Co., and declared to embrace all the conditions of the loan.

The contract further stipulated that the city would furnish the bonds as rapidly as they could be executed.

Printed record, pp. 36—37.

The contract of August, 1868, was similar to that of November, except that it contained no stipulation that T. E. Brown & Co. would release the city.

On the twenty-first of November, 1868, T. E. Brown & Co. delivered to the City Attorney the collaterals under the contract, to cover not only the loan of bonds made by the city on the twentieth day of November above referred to, but the collaterals to cover the loan of the $100,000 in bonds made by the city to T. E. Brown & Co. on the twenty-sixth of August preceding.

See printed record pp. 289, 37—42, 8, 310.

The bill charges that the city delivered T. E. Brown & Co. one hundred and forty of the one hundred and seventy-five bonds loaned under the contract of the twentieth of November, and also delivered an acceptance (meaning a letter or letters written by the Mayor addressed to T. E. Brown & Co., agreeing to deliver to them or their order, as soon as it was possible to sign them, bonds of the city, see the form at pages 295, &c., of the printed record), for $35.000, thus making together the sum of $175.000, agreed to be loaned.

And see answer to amendment, cross bill, printed record, pp. 128—129.

And the answer, though complaining of the manner of the delivery of the bonds, substantially admits that all of the one hundred and seventy-five were delivered, except thirty-five

Printed record, pp 53—54.

In his deposition Brown states that he negotiated the order for the $35,000 in bonds early in December, 1868, with the Manhattan Bank of Memphis.

Printed record, p 281.

This order, or acceptance, as the bill calls it, had never been returned to the city when the cross bill was filed, but the court in a decree pronounced in the cause ordered its surrender to the city to be cancelled.

Printed record, p. 408.

The bonds loaned were delivered in part on orders from T. E. Brown & Co., and the others were delivered to T. E. Brown & Co. directly.

The orders receipted, and the receipts, are in the printed record, pages 295—302.

The bonds delivered, as shown by the receipts and Hoy's testimony, amount to more than enough to cover both loans.

The complaint of T. E. Brown, as stated in his testimony at page 279 of the printed record, that Mayor Leftwich used $40,000.00 of the bonds set aside for T. E. Brown & Co. by the loan contract, is fully answered by the facts, as already shown, that T. E. Brown & Co. *did receive* from the city *all* the bonds,

or something which they accepted as the equivalent of them. The complaint was made to the Mayor about the 1st of January, 1869. Nearly all the bonds were received before the 1st of January, and all but five had been delivered a week after that date.

Printed record, pp. 293–302.

And Brown's statement in his testimony (printed record, p. 281), that none of the forty bonds used by Mayor Leftwich were delivered until June following, is contradicted by the receipts already referred to.

Besides, as already shown, at the time of the agreement to loan the one hundred and seventy-five bonds, and before that time, T. E. Brown & Co. were indebted to the city in a balance of $68,174.64 for bonds overpaid by the city on the contracts for work done to be paid for in bonds, and also in a balance on account of overpayments made by the city on the cash contracts.

Printed record, pp. 5, 15, 349.

The circumstances under which the loan of the 20th of November was made are detailed by T. E. Brown in his testimony.

He says the Board hesitated about loaning T. E. Brown & Co. 175 bonds. It met in executive session and voted to give them only 150. He declined to receive that number and execute the voucher required, with the release clause in it, unless the Board would make the number 175, which, after several meetings and some hesitation, was acceded to, and the contract signed.

See printed record, p. 279.

Again he says:

"It was disputed by the city authorities that the city was liable, primarily, for paving done in front of private property before the bond loan of November, 1868, was made.

"I threatened to bring suit unless the city paid us on the contract the whole, or some part, of the sums embraced in the bills, or in some way give us something on which money could be raised to complete work. Whereupon the City Attorney

took the position, which to me was novel, that the contractors could not look to the city, until they had exhausted their remedies against property-holders. This view of our rights under the contract was a surprise to me. * * * Col. Morgan told me there was but one way to get anything from the city, which was to propose to release the city primarily on the bills, or a part of them.

"This was about the time of the last loan contract. It was never contended by any one, to my knowledge, at the time of the first bond loan, that the City was not primarily liable. The reason assigned * * * for the first bond loan, instead of paying us the bonds, was that any act on the part of the city which looked as if the city was assuming the payment of that part of the debt, would stop collection of the property-holders.

"I proposed, according to Col. Morgan's advice, to release the city on the conditions specified in the loan contract of November, 1868, and thereupon the contract was entered into."

Printed record, pp. 280 281.

The contract made in respect to the first loan of bonds, 26th of August, 1868 (printed record, pp. 85—86), recites that the City, being anxious to aid T. E. Brown & Co. with sufficient means to enable them to complete at an early day all their contracts with the city for laying the Nicolson pavement in Memphis, did enter into the agreement to lend the 100 bonds.

Nothing is said in the contract about the city being indebted to T. E. Brown & Co., but the contrary is plainly implied by the provision for the return of the bonds and interest, and the provision that the city was to receive and hold paving bills due by property-holders, or money collected on them, as security for the return of the principal and interest of the bonds.

And the fact was, as already seen, that, at that very time, T. E. Brown & Co. were indebted to the city for a balance of over payments on the "cash contracts," and also a balance in bonds of $68,174.64, according the city's account (printed re-

cord, pp. 5 and 15), or $55,834.83, according to the Master's report (printed record, p. 349).

The bonds loaned under the two contracts, or at least 260 of them, were issued under an ordinance authorizing bonds to be issued "for the purpose of paving the streets and alleys of the city."

The ordinance has already been copied in this statement, and may be seen in the printed record, pp. 208—209, and see page 201, question and answer 3, and page 355.

The provision of the charter on the subject has also been copied in connection with the history of the "bond contracts."

The other 15 bonds loaned were issued under an ordinance authorizing the issue of bonds for the purpose of funding the debts of the city. It may be seen at page 206 of the printed record.

And the act of the Legislature under which the ordinance was passed, is in the printed record, pages 204—205.

The Supreme Court of Tennessee held, in reference to the bonds issued under this ordinance, that they could be used only for the purpose of funding the due debts of the city at par, and could not be sold or negotiated in the market for a less price.

Farrington and others vs Mayor and Aldermen, &c, MS. decree.

Under the charter of the city in force when the bonds in question were issued and loaned, the city had power to issue bonds only for the following specific purposes:

1. For school purposes.
2. For erecting water-works.
3. For the construction and pavement of the streets and the wharf.
4. For the purpose of aiding in the completion of certain specified railways.
5. For the purpose of funding the debt of the city.
6. For the purpose of paying a subscription for stock in a railroad within or without Tennessee.
7. For the purpose of making any public improvement that might be desired.

8. For the purpose of acquiring any property for the public use of the city.

But no bonds could be issued until the question of their issue had been submitted to the qualified voters and they had voted to issue them.

The charter contained the general provision following, Sec. 36, Art. III., Title V.:

"The Mayor and Aldermen of the City of Memphis shall not have the power to issue the bonds of the city, having longer than one year to run, for the purpose of defraying the ordinary current annual expenses of its administration; and the bonds issued, or to be issued in any one year, and having one year or less time to run, shall not exceed in amount the city revenues of the preceding year."

Memphis Ordinances for the year 1867, pp. 220—224.

None of the bonds loaned, and none of the bonds overpaid, have ever been returned to the city, but they were negotiated by T. E. Brown & Co., and are now in the market, and the city has paid, or will have to pay, all of them.

In his report the Master has charged them to T. E. Brown & Co. at about fifty cents on the dollar.

See printed record, pp. 348—350.

The city has filed an exception to his action in doing so.

Printed record. p. 366.

SUITS BY T. E. BROWN & CO. AGAINST THE PROPERTY OWNERS.

Many suits were brought by T. E. Brown & Co. against the property owners, to recover paving accounts assessed against them, and so far as the record discloses, all that have been decided have resulted in decrees in favor of T. E. Brown & Co. None have been decided against them.

Printed record, pp. 8-9, 55, 355, 358-363, 406-407, 64-65, 128.

SUIT AT LAW AGAINST THE CITY ON THE PAVING ACCOUNTS.

Before any of the suits against the property owners had been determined adversely to T. E. Brown & Co., they brought an action at law in the Circuit Court of the United States for the District of West Tennessee, against the city, to recover from it all the unpaid paving accounts due by the owners of property in front of which the pavement had been laid down.

The declaration in this suit was filed on the 29th day of March, 1870, and it and the pleadings and proceedings in the action may be seen in the printed record, pp. 130-172, 402-408.

SUIT IN CHANCERY IN STATE COURT BY CITY AGAINST T. E. BROWN & CO.

On the 17th day of November, 1870, the city of Memphis filed in the Second Chancery Court of Shelby county a bill against T. E. Brown and others, charging that T. E. Brown & Co. had not returned the bonds loaned them; that they were collecting the paving accounts, which the city held under the bond loan contracts, as collateral security for the return of the bonds, and were not substituting other accounts for those collected, nor accounting to the city for the amounts collected; and praying that T. E. Brown & Co. be enjoined from collecting any more paving accounts until they deposited with the City Attorney an amount sufficient to secure the city in the return of the bonds loaned; and that an account be taken between the city and T. E. Brown & Co., and that the city have a decree against them for the amount due on the loan of the bonds, and for the amount due for overpayments made on account of the pavement laid down.

An injunction was ordered and issued according to the prayer of the bill.

REMOVAL OF SUIT TO CIRCUIT COURT OF THE UNITED STATES.

T. E. Brown then filed a petition and an affidavit that he

could not obtain justice in the State court, and under the act of Congress of 1866, obtained a removal of the cause to the Circuit Court of the United States for the District of West Tennessee.

The bill, exhibits and proceedings in the State court may be seen in the printed record, pp. 1–46.

PROCEEDINGS IN SUIT IN U. S. CIRCUIT COURT.

T. E. Brown, after the removal, filed his answer to the bill. He made it a cross bill, according to the State practice, but upon objection, filed a formal cross bill.

Printed record, pp. 403-404.

He subsequently amended his cross bill, and the city filed answers to the original and amended cross bills.

The answers, cross bill, exhibits, etc., are in the printed record, pp. 47–130.

CLAIMS SET UP BY T. E. BROWN & CO. IN THE CROSS BILL.

The cross bill asserts claims against the city because—

1. It failed to collect the accounts for paving from the property owners, according to the contracts, or to take any steps or measures therefor.

2. Because it failed and refused to secure the bonds it agreed to pay for the work done under the bond contracts, and failed and refused to provide a sinking fund for the payment of the principal and interest of them.

Printed record, pp. 69-71.

3. Because of delays caused by the gas company and street railway company occupying the streets just in advance of the work of paving the streets, to lay gas pipes and street railway tracks, whereby T. E. Brown & Co. were damaged.

The claim on the above account is $4500.00.

4. Because the City did not bring suits on the paving accounts, but T. E. Brown & Co. did bring the suits, and employed counsel for the purpose, and expended $10,000 thereby, and are entitled to recover the same of the city.

5. Because T. E. Brown & Co. collected the paving accounts, without suit, to the amount of about $250,000, which it was the duty of the city to collect, under the contracts, but which it neglected to collect, and therefore T. E. Brown & Co. are entitled to $25,000.

Printed record, p. 70.

6. The cross-bill, as well as the answer, claims that T. E. Brown & Co. should not be required to return the bonds loaned them, or pay the face of them, but should be allowed to account to the city for them at their market value, which was about fifty cents on the dollar, and apply the amount as a credit on what the city owed them.

Printed record, pp. 72, 53—54.

AMENDMENT TO CROSS-BILL.

The amendment to the cross-bill filed March 20th, 1871, (printed record, pp. 122—123), asserted a claim against the city for the amount of all the accounts for paving done in front of private property, being the same matter embraced in the action at law of T. E. Brown & Co. against the city before mentioned.

PROCEEDINGS IN SUIT AT LAW STAYED.

Upon the filing of this amendment to the cross-bill, the Court ordered that the proceedings in the action at law be stayed, to the end that the matters might be determined in the chancery cause.

Printed record, p. 404.

PROCEEDINGS IN U. S. CIRCUIT COURT.

On the 13th of April, 1871, within a week after the filing of the replication to the answer to the cross-bill (printed record, p. 130), and before the demurrer in the answer (printed record, p. 125), had been disposed of (and it never has yet been disposed of), T. E. Brown & Co. filed a motion for a reference of the cause to the Master (printed record, pp. 173—174), and on the 24th day of April, after ordering that the action at law be

joined with the suit in equity, the Court, against the objection of the city, and before settling the principles of the decree that should be pronounced, ordered the reference, stating the matters upon which the Master should report, and directed him to report, *as soon as practicable*, his conclusions upon the proof taken concerning the matters and things referred.

To the order of reference the city entered its exception.

Printed record, pp. 404—408.

MASTER'S REPORT.

On the 2d of September, 1871, Mitchell, the Master, filed his report under the reference, in which he undertook virtually to decide the case against the city, both upon the law and the facts.

See his Report in the printed record, p. 342–357.

The result of the report was a balance against the city of $496,352.64, on the 1st of August, 1871.

Printed record, p. 348.

CITY'S MOTION TO SUPPRESS REPORT.

The city filed a written motion to strike out and suppress the report, for certain causes stated in the motion.

Printed record, pp. 364—365.

The Court overruled this motion, and the city excepted.

Printed record, p. 408.

CITY'S EXCEPTIONS TO MASTER'S REPORT.

The city also filed exceptions to the report of Mitchell as Master.

See them in the printed record, pp. 365—376.

FINAL DECREE.

In the final decree the Court overruled the exceptions and confirmed the report, except in respect to the item of damages for failure to provide a sinking fund, which item it reduced.

Printed record, pp. 409—410.

CITY'S OBJECTION TO CERTAIN TESTIMONY.

The city also moved to suppress portions of the depositions on file on the part of T. E. Brown & Co. for irrelevancy and incompetency, the particular parts of the depositions which were objectionable being pointed out by the motion; but the Court overruled the motion, and admitted and considered all the testimony, and the city excepted.

Printed record, p. 409.

AMOUNT OF FINAL DECREE.

The amount decreed against the city is $488,993.00, with costs to be taxed by the Clerk, the judgment to bear interest at the rate of six per cent.

Printed record, p. 410

ITEMS GOING TO MAKE UP AMOUNT OF DECREE.

To make up the amount of the decree, the following items were allowed, and charged against the city:

1.	Paving accounts due by property owners, and interest to August 1, 1871	$ 508,405 78
2.	Damages for failing to provide a sinking fund for the paving bonds (This item was reduced by the final decree to $89,808 00. Printed record, page 410.)	115,216 00
3.	Fees of attorneys employed by T. E. Brown & Co. to prosecute suits on the paving accounts against the property owners	10,000 00
4.	T. E. Brown & Co.'s services in collecting the paving accounts, without suit	25,000 00
5.	Value of adjusting street railway track, on Poplar and Beal streets, to the pavement	2,830 00
6.	Damages by city's suspension of work	3,000 00
	Amounting to	$664,451 78

Printed record, pp. 348–349.

7.	Paving for which city was liable, and interest to August 1, 1871	$ 92,317 28
8.	Adjusting railway track on Main street to pavement	5,000 00
	Making	$ 97,317 28

CITY'S CREDITS IN FINAL DECREE.

The city was credited as follows:

1.	Damages for failure of T. E. Brown & Co. to return 239 of the city's thirty-year $1000.00 bonds, loaned them, including interest to August 1, 1871	$146,713	00
2.	Uncollected royalty, under "bond" and "cash" contracts, and interest to August 1, 1871	28,241	18
	Making	$174,954	18
3.	Balance of $55,884 88, in bonds overpaid, obtained by deducting value of work for which the city was primarily liable, from aggregate of paving bonds delivered by the city under the "bond" contracts, and accrued interest on them, and the amount of royalty collected, the bonds being estimated at 52 cents on the dollar	28,774	11
4.	Proceeds of $40,000 city scrip	17,822	50
5.	Bills payable	22,520	96
6.	Draft to First National Bank	5,000	00
7.	$12,000 city bonds, at 60 cents	7,200	00
8.	Royalty collected on "cash" contract	9,831	08

Printed record, pp. 349-350.

The Master does not charge T. E. Brown & Co. with the $35,000 order or acceptance, or any part of it.

Printed record, pp. 348-350.

Though, as already shown, the court by its decree directed its surrender by T. E. Brown & Co. to the city for cancellation.

Printed record, p. 408.

CLAIM OF T. E. BROWN & Co. FOR DAMAGES FOR THE FAILURE OF THE CITY TO PROVIDE A SINKING FUND FOR THE BONDS WHICH WERE PAID FOR PAVING.

Printed record, pp. 346, 348, 352.

When the bond contracts were let to Forrest, Montgomery & Co., it was distinctly understood between the Mayor and

Board of Aldermen and Forrest, Montgomery & Co. that the bonds to be paid for the work were not to be put in the market for sale.

Before the bid was accepted, Hopper & Montgomery, which was the same firm as Forrest, Montgomery & Co. (afterwards Forrest, Mitchell & Co.), addressed a communication to the Mayor and Board of Aldermen, in which they said:

"We deem it due to you and ourselves to state, that, before we made a bid for the contract for paving certain streets of the City of Memphis with Nicolson pavement as proposed, we had made certain arrangements to do the work without a sale or conversion of the city bonds or depreciation of the city credit.

"Mr. Joseph Mitchell, of Louisville, who is a wealthy and responsible man, agrees to furnish all the lumber, etc., we need to execute the contract, and we have full and specific arrangements with capitalists at Louisville and St. Louis to furnish all the money we may require above our own private means in carrying out the contract.

"Our reason for making arrangements complete before submitting any bid, was to avoid placing any of the bonds which may be issued on the market for sale. We know that our profit in entering into a contract and executing the work consists in holding the bonds and so placing them from time to time as not to depreciate them or have them offered for sale.

"We are fully prepared to execute bonds, with ample security, for the performance of our contract, if it is awarded to us, and we invite your favorable consideration of our bid."

Printed record, p 114.

They procured and sent the Board of Aldermen the following endorsement of their communication from a prominent citizen:

"*To the Honorable Board of Mayor and Aldermen of the City of Memphis:*

"My acquaintance with the above named parties fully justifies me in giving you assurance that they will do as they state,

and are fully prepared to comply with the contract without depreciating the city credit or selling the bonds.

"Very Respectfully,

T. S. AYERS."

Printed record, p. 114.

The inducement so held out controlled the action of the Board in prefering Forrest, Montgomery & Co. to Jones & Greenlaw, as contractors.

Printed record, pp. 113—115.

T. E. Brown & Co. knew, before they became the assignees of the contracts, that the city had not provided a sinking fund to pay the principal and interest of the paving bonds according to the bond contracts and the ordinance, and that Forrest, Mitchell & Co. had notified the city that in consequence of the failure they could not proceed with their contracts, and that the city bonds were worth in the market only fifty cents in the dollar. And they also knew before the fifteenth of October, 1867, that the $150,000 of paving bonds issued to Forrest, Mitchell & Co. to pay for the work they had done under the bond contracts, had been offered in the market, and were valued at about fifty cents.

Printed record, pp. 341, 343.

After possessing all this knowledge, T. E. Brown & Co. received the bonds, which they now claim the damages upon, without any kind of remonstrance or objection, and they have negotiated all of them, and they are yet outstanding in the market.

The report of the Master shows that all the bonds received by the contractors *were sold.*

Printed record, p 354.

It also shows the market value of the bonds during the time in which the sales were made.

Printed record, p. 352.

It also shows that T. E. Brown & Co., about the time they

received the bonds loaned them, sold *those* bonds in the market for from forty-nine to fifty cents on the dollar.

Printed record, p. 348.

But there is nothing in the report, nor elsewhere in the record, to show that Forrest, Montgomery & Co., or T. E. Brown & Co., ever in fact sold any of the bonds *paid them* by the city for paving laid down, at a discount, or at any price less than their face value.

The Master reports that the city for a series of years past put its bonds in the market for sale, and sold them at a discount exceeding fifty per cent. in many cases.

Printed record, p. 347.

The city filed exceptions to this part of the report.

Printed record, pp. 365–366, 368, etc.

In answer to a question, Lofland, a witness for T. E. Brown & Co., said positively that it was not the practice of the city during his term of office, nor the practice of previous administrations, to put its bonds into the market and sell them at such prices as they would bring in the money or stock market. He was Mayor or Comptroller from September, 1860, to January, 1868, and he acquired his knowledge in that way.

Printed record, p. 186, questions and answers 28 and 29; p. 182, question and answer 2.

Bridges, the City Treasurer, another witness for T. E. Brown & Co., said bonds were sold by the city in 1856 for cash.

He further said he did not recollect that the city sold any bonds after 1856, until 1868, and that they were sold in 1868 and 1869, and that the amount so sold was about $750,000.00, or perhaps $500,000.00, at about fifty cents on the dollar.

Printed record, p. 197, questions and answers 5 and 6; and p. 198, questions and answers 9 and 10.

He said that the bonds sold for the city in 1868 and since,

were sold by the Chairman of the Finance Committee, by the witness as Treasurer, and by other agents of the city.

Printed record, p. 197, question and answer 8.

He also said that the members of the Board of Aldermen knew of and acquiesced in the sales of the bonds, and that the proceeds of the sales were reported to the Board, and used for city purposes. He said that probably they were authorized in what were known as executive or secret sessions of the Board.

Printed record, p. 198, question and answer 13.

The secret or executive sessions referred to were informal meetings of the members, not official, and no minutes were kept of them.

Printed record, p. 201, question and answer 4; and p. 314, L. R. Richard's deposition.

The official records of the city do not show any action of the Board of Aldermen authorizing or ratifying the sales of the bonds of the city in the market for less than their face, or any sales of bonds at any price.

Printed record, p. 201, question and answer 5; pp. 209–210, 210–211, 314.

CHARTER.

The city charter at the time provided that no bonds should be issued for the construction and pavement of the streets and wharves of the city "until and unless the Board of Mayor and Aldermen first, before such issue, provide by ordinance for the regular and prompt payment of the annual interest on such bonds, and also provide an annual sinking fund to commence at least within six years after the issue of the bonds, and sufficient in amount to retire or redeem the same by maturity."

Memphis City Ordinances for 1867, p. 222.

No action was ever taken to compel the providing of the sinking fund either by T. E. Brown & Co. or any holder of any of the bonds, but all acquiesced in the failure of the Board of Aldermen and the General Council to provide it,

if it can be said that there was a failure before the expiration of the six years, within which the charter required it to be done.

The claim for damages is based upon the supposition that had the city provided the sinking fund, *which it did not do*, T. E. Brown & Co. could have sold the bonds paid them, in the market for a greater price than they in fact realized for them.

The character of the claim, and the evidence relied upon to establish it, clearly appear by question 7 to Tobey, a witness, and his answer, which are as follow:

Q. "State if you know the market value, in this city and in New York, from January 1st, 1868, to January 1st, 1871, of Memphis city short bonds, running five, ten, and fifteen years, in equal proportions, with six per cent. coupons attached, payable semi-annually, principal and interest provided for by a sinking fund set aside for that purpose; or what, in your opinion, would such bonds have been worth?"

"A. I know of no such bonds having been in the market; had there been bonds of that character, principal and interest to be secured and provided for as stated, they would in my opinion have been worth from eighty-five to ninety cents on the dollar."

Printed record, p. 176

Question 7 to the witness Murphy, and his answer to it, show that he did not understand the nature of a sinking fund, and that he based his opinion as to the probable value of the bonds upon a supposed state of facts that could not have existed, even if the provision for a sinking fund in the paving contracts and the ordinance had been carried out to the letter. They are as follow:

Q. "What in your judgment would have been the market value of the bonds described in the last question and answer during the period and at the places referred to, had the city guarantied and provided for the payment of the bonds, principal and interest, by a sinking fund set aside for that purpose?

"A. Had such fund been actually collected and placed in the hands of trustees of known integrity, and that fact generally known by the community here and in the eastern cities, in my opinion such bonds would be readily sold from eighty to ninety cents on the dollar."

Printed record, p. 178. And see Murphy's explanation of his deposition, printed record, p. 399. See also Barrett's answer to question 6, printed record, p. 179; Elder's answers to questions 5 and 6, printed record, p. 175; answer of Lofland to question 18 printed record, p. 124; answer of Jacob Levy to question 9, printed record, p. 252; answer of Cyrus J. Lawrence to question 9, printed record, p. 254; answer of Stephen V. White to question 9, printed record, p. 255; answer of Hachfield to question 9, printed record, p. 257; answer of Davis to question 2, printed record, p. 386; answer of Cobb to question 2, printed record, p. 387; answer of Farnsworth to question 2, and E. M. Apperson's answer to question 2, printed record, p. 391, all showing the nature of the claim for damages, and of the evidence in reference to it.

And see cross-examinations of I. B. Kirtland, printed record, p. 388; of Farnsworth, printed record, pp 389; of Thacher, printed record, pp. 389 - 390; of Davis, printed record, pp. 390—391; question 9, in Farrington's cross-examination, printed record, p. 392; cross-examination of Garth, printed record, p. 393, and cross-examination of L. Levy, questions 6, 8 and 17, printed record, p. 396.

DISCOUNT ON THE $40,000 SCRIP OR WARRANTS, AND $12,000 BONDS PAID THE CONTRACTORS.

Mitchell, the Master, reported that $40,000 of scrip was delivered by the city to Taylor, McBean, & Co. as collateral to its indebtedness to them, with power to sell; that they were credited by the city in its books with the discount $21,677.50, and that they have returned no part of it. He charged them only with the proceeds of the scrip.

He said the authority for doing so was the long practice, and continued approval by the city of the practice, and the general powers of the city.

Printed record, pp. 350, 354.

The city excepted to this part of the report.

Printed record, p. 368.

Lofland, a former Mayor, being in office from October, 1866, to 6th of January, 1868 (printed record, p. 182), and a witness for T. E. Brown & Co., said he did not remember any special agreement as to the terms on which the contractors received scrip, but he presumed it was on the belief of the contractors that the city would make good to them the loss on the scrip.

Printed record, p. 187, answer 32; p. 183, question and answer 9.

He also said that the city paid the contractors in warrants at their market value, as far as payments were made.

Printed record, p. 183, question and answer 7.

The resolution of the Board of Aldermen of August 21, 1867, required that thereafter all officers and employees of the city be paid *in cash or its equivalent.*

Printed record, p. 209.

There was no other authority from the Board of Aldermen for paying the contractors in that amount of scrip or warrants which, sold in the market, would realize in cash the sum or sums due them, than the resolution.

Printed record, p. 202, question and answer 7, and p. 314.

The credit of the discount on the scrip, amounting to $21,667.50, was entered in the Comptroller's books to the contractors.

Printed record, pp. 291, 292—298, 314.

The usual way of paying the current expenses of the city government in 1866—1868, was by selling the scrip or warrants of the city at a heavy discount.

Printed record, p. 184, question and answer 13; p. 199, question and answer 19.

In reference to the $12,000 bonds charged to the contractors at $7200 (printed record, p. 350), and excepted to by the city, (printed record, p. 354), the facts are substantially that the bonds were charged to the contractors in the Comptroller's

office at the price of $7200, and there was some sort of understanding between the contractors and the Mayor and other officers of the city, that the discount should be allowed, but there never was any official action of the Board of Aldermen on the subject.

ASSIGNMENT OF ERRORS.

ON THE BILL OF THE CITY.

I.

There was error in the decree of the Court below in decreeing that T. E. Brown & Co. could discharge themselves from their obligation to return the bonds loaned them by paying the market value of city bonds. The Court ought to have decreed that they return the bonds and coupons according to their contracts, or else pay the city the nominal or face value of them.

II.

There was also error in decreeing that T. E. Brown & Co. could discharge their liability for the bonds overpaid them on the "bond contracts" by paying the market value of bonds. The Court ought to have decreed that they return the bonds and coupons, or pay to the city the nominal or face value of them.

III.

There was error also in decreeing that T. E. Brown & Co. should be charged only with the market values of the bonds and scrip or warrants paid them on the "cash contracts." They should have been decreed to return the bonds and scrip or warrants specifically, or pay the city the nominal or face value of them.

ON THE CROSS-BILL OF T. E. BROWN & Co.

I.

There was error in the decree of the court below in holding that T. E. Brown & Co could maintain a suit against the city on any liability growing out of the paving contracts before any court had decided that the property holders were *not* liable for the pavement. T. E. Brown & Co. should have been decreed bound by their release contained in the bond loan contract of the twentieth of November, 1868 (printed record, pp. 36—37), and their cross-bill, should for that reason have been dismissed.

II.

There was also error in decreeing that the city was liable under the "cash contracts" by reason of the guaranty provision, or for any other reason, for the paving laid down in front of private property. The decree should have been that the property-owners were liable for the said paving, and that the city was not liable therefor.

III.

There was also error in the decreeing that the city was liable for the paving laid down in front of private property under the "bond contracts," as the contracts, after the agreed modification of them, contained no undertaking by the city to pay for the said paving, nor any provision by which the city undertook to guaranty the payment of the paving accounts of he property-owners.

IV.

There was error in decreeing that the city was liable to pay T. E. Brown & Co. for the services performed by the contractors in collecting the paving accounts without suit, because, by the contracts, the contractors were to collect the paving accounts, and were not entitled to be paid therefor, and the city did not, at any time, employ them to perform, or agree to pay them for, the said services.

V.

There was error in decreeing that the city was liable to pay T. E. Brown & Co. the sums they paid attorneys for services in conducting the suits on the paving accounts against the property owners, because the attorneys performed the services for T. E. Brown & Co., and not for the city; and the city never authorized or requested T. E. Brown & Co. to employ attorneys, nor agreed to pay for the services of attorneys employed by them; but the contracts, as well as the provision of the charter, and the ordinance under which the contracts were made, made it the duty of the City Attorney, a salaried officer of the city, to prosecute all the said suits.

VI.

There was error in decreeing that T. E. Brown & Co. should recover of the city damages for its failure to provide a sinking fund for the payment of the interest and the redemption of the bonds paid for work done under the "bond contracts." The default was personal, and not corporate, and the officers of the city should have been, or should now be, compelled by mandamus to provide the fund, and the city is not liable in damages for their default. The contractors, by accepting the bonds without objection or protest, and negotiating them, waived any claim for damages, if they otherwise would have had a claim. If any one has a right to damages, it is the holder of the bonds, and not T. E. Brown & Co., who have disposed of all the bonds.

But, the bonds themselves prescribe the extent of the city's liability in respect to them, and there can be no recovery from the city for damages, except it be imposed by the bonds. The damages decreed are speculative merely, and are of too uncertain and doubtful a character to be the subject of legal computation. But if damages are to be allowed, the amount decreed is at least $40,000.00 more than it should be, taking as a basis of calculation the value of the bonds, *with* the sinking fund provided, as estimated by the city and the contractors in

the "bond contracts," and the modification of them, and the market value of the city's bonds generally.

VII.

I assign as an additional error arising upon the entire record, that the Court below, before the cause was ready for decree, and without settling the rights of the parties, referred it to a Master for an account, and the Master took and stated the account, under his own view of the law and the facts, and virtually decided the entire case, instead of the Court.

Printed record, pp. 404-408, 342-363.

BRIEF OF THE ARGUMENT.

I.

CITY'S BILL.

The original bill filed by the city was for the purpose of having the specific return, or the payment of the face value, to the city of the bonds loaned T. E. Brown & Co. on the 26th August, 1868 and the 20th November, 1868, the bonds overpaid by the city on the "bond contracts," and the balance overpaid by the city on the "cash contracts," including the sums claimed by T. E. Brown & Co. for discount on the scrip or warrants paid them, and the discount on the $12,000 of bonds paid them, and to have the collaterals deposited by T. E. Brown & Co. for the return of the bonds loaned them applied to the satisfaction of the balance found due.

The only material questions arising on the bill are, whether the bonds and scrip or warrants are to be returned specifically, or the face value of them is to be paid, as insisted by the city, or the demand arising out of the conversion of the bonds and scrip or warrants, is to be satisfied by paying merely the market value of them at the time, and interest, as insisted by T. E. Brown & Co.

(*a*)

AS TO THE BONDS LOANED, AND THE BONDS OVERPAID ON THE BOND CONTRACTS.

The contracts made when the loans were effected each provided expressly for the return at the expiration of the loans

respectively of the specific bonds and coupons loaned, or, if the coupons were not returned, then for the payment by T. E. Brown & Co. of the interest on the bonds.

And the law implied a like contract to return the bonds overpaid on the "bond contracts," as soon as the fact of the overpayment was ascertained, or the payment of the face of them, especially as the "bond contracts" provided that the bonds were to be taken *at par*.

It is plain that justice requires that the contracts should be carried out, either literally, according to their terms, or substantially according to their legal effect.

The common law only awards damages for the breach of a contract. But courts of equity require the offending party to perform strictly what he cannot without manifest wrong or fraud refuse. Wherever, therefore, the party wants the thing *in specie*, and he cannot otherwise be fully compensated, courts of equity will grant him a specific performance. And this is the true test in the present exercise of equity jurisdiction, and not a supposed distinction between real and personal property.

Story's Eq., S cs. 714, 716, 717, 717a, 730.

And even contracts for stock are decreed to be specifically performed where the stock has a peculiar value, and is incapable of compensation in damages.

Story's Eq. J., Secs. 717a, 724, 724a.

And Judge Story says that this court has evinced an inclination to maintain a far more extensive jurisdiction in equity to grant relief by a specific performance, in contracts respecting personal chattels, than is at present exercised in the English courts, and cites Barr *v.* Lapsley, 1 Wheaton R., p. 151, Mechanics Bank, &c. *v.* Seton, 1 Peter's R. 305.

It has been recently decided that an agreement by the holder of notes to deliver them up to the maker to be cancelled, may be specifically enforced, and the maker should not be left to wait an opportunity to defend an action on the notes.

Tuttle v. Moore, 16 Minnesota R. 128.

In the State of Illinois *v.* Delafield, 8 Paige's Ch. R., p. 527; same case on error, 26 Wendell R., p. 191, a bill was maintained in behalf of the State to compel the surrender of certain of its bonds, or certificates of public stocks, or the proceeds of them, in a case where the agents of the State had disposed of the bonds or stocks contrary to law.

And see Fry on Specific performance, p. 5, Secs. 10, 11.
Phillips v. Burger, 2 Barb. Sup. Ct., R. 608, 610 - 612.
Phyfe v. Wardell, 2 Edward's Ch. R., 47.
Stuyvesant v. The Mayor, etc, 11 Paige R., p. 414
Nevitt v. Gillespie, 1 Howard's, (Miss.) R., p. 108, on the subject of specific performance.
And Langton v. Waite, Law Report, 6 Eq, p. 165.

The necessity for the return of the bonds in this case arises out of the fact that the city is legally bound to pay the full amount of them, when due, and during their currency is required to pay interest at the legal rate on the amounts expressed on the face of them.

These facts, I submit, render the bonds the legal equivalent of the amounts of money they profess to bind the city to pay; and if T. E. Brown & Co. choose to withhold the bonds, in violation of their contracts, they ought to put the city in a position to be able to pay the interest as it falls due, and take up the bonds at maturity, which can be done only by paying to it an amount of money equal to the amount of the bonds.

Suppose the bonds are rated at fifty cents on the dollar, and the court requires T. E. Brown & Co. to pay the value of the bonds at that price. The result is that the interest on the sum paid will be just half enough to pay the interest on the bonds as it accrues, and just half enough to pay the principal of the bonds when it falls due.

And thus the city will lose just half the amount of the bonds that T. E. Brown & Co. are bound by their contracts to return it.

If it is said that the city can go into the market and purchase its bonds at the market price, and with the sum to be paid by T. E. Brown & Co. can buy up enough bonds to indemnify itself against the bonds that T. E. Brown & Co. borrowed, I reply that the court will hardly adjudge it to be the

duty of the city, even if it had the money, to speculate on its depreciated credit.

But T. E. Brown & Co. do not propose to put a dollar of money in the hands of the city to buy up bonds in order to indemnify itself.

They propose that all they owe for the bonds be placed as a credit on the debt they claim the city owes them, leaving the city, if it chooses to buy up its bonds, to provide the money with which to do so.

And the court has no evidence that the city has, or can raise the money necessary, but pretty strong evidence that it neither *has* nor *can raise* it.

Nor is there anything in the record to assure the court that if the city had the money it could buy the requisite amount of the bonds at the price that has been fixed as the value of them.

I submit that it is an important consideration in this view of this case, that the officers of the city, acting in the loan of the bonds, committed a breach of trust, or at least a violation of duty, in making the loans, and that T. E. Brown & Co. participated with them in the wrong, and that the city, the party wronged, is now asking the return of the bonds as the only means of redressing that wrong.

Besides, the mere fact that the bonds borrowed by T. E. Brown & Co. are outstanding, is a very serious injury to the credit of the city, for the other bonds of the city are thereby rendered less valuable, and its capacity to contract other necessary debts upon advantageous terms, is diminished. Not only so, but it is forced to levy a higher rate of taxation to pay the interest and provide a sinking fund, and thereby to retard the prosperity of its inhabitants and deter emigration.

For the principles on which a court of equity proceeds in cases like the present, see Delafied *v.* The State of Illinois, 26 Wendell R., pp. 192, 217–221.

If it be said that T. E. Brown & Co. have disposed of the bonds loaned them, and therefore cannot return them in specie, I reply that a substantial specific performance is all that the

city asks. It is quite immaterial to the city whether the *very* bonds loaned T. E. Brown & Co. are returned or not, so that an equal amount of bonds, with corresponding coupons for interest, are returned. It is entirely within the power of T. E. Brown & Co. to return an equal amount of bonds, as it is proven they are purchasable in the market, and by the return of an equal amount, the city will be placed substantially in the same situation as if the bonds loaned had been returned according to the two contracts.

But, if the fact that T. E. Brown & Co. have disposed of the bonds is a bar to a technical decree for the specific return of bonds, then I contend, and will argue further on, that the measure of the city's relief is the nominal value of the bonds, and that the court, in administering substantial justice, must pronounce a decree to that effect.

(b)

THE SCRIP AND BONDS DELIVERED T. E. BROWN & CO. AS PAYMENTS ON THE "CASH CONTRACTS."

The facts in the record have been detailed, and they are substantially that the officers of the city, probably the Mayor and the Comptroller, without any authority from the Board of Aldermen (printed record, pages 201, 314,) delivered T. E. Brown & Co. $12,000.00 in bonds, which they charged to them at $7200.00, and $40,000.00 in scrip or warrants, on which they credited them by $21,667.50 discount or loss on sale.

Printed record, 12, 291, 292–293.

The Master reported that the city was estopped from pleading it had no power by its officers to make such a disposition of its scrip or warrants as the entries on its books showed, because T. E. Brown & Co. purchased the contracts from the former contractors on the faith of the state of facts so shown.

And this fact, and the practice of the city's officers for a series of years to sell the scrip or warrants and the bonds of the city at a discount, constitute the Master's sole reasons for allowing T. E. Brown & Co. the discount on the scrip or warrants and bonds.

Printed record, p. 846—847, finding 11, and p. 847, finding 16.

I submit that the Master's conclusions are entirely unwarranted.

The city could not be estopped by the act of its Mayor and Comptroller, or other officers.

Dillon on Municipal Corporations, Secs. 381, 749, 766.
Halstead v. The Mayor, &c., 3 New York R. (3 Comst.) p. 430.

And, if the sale of bonds or scrip at a discount was unlawful, it is idle to suppose that acquiescence by the city or its officers in like sales, for any length of time, or in any number of similar transactions, could make lawful or valid the particular sales in question.

Butler v. Charlestown, 7 Gray R. p. 12.

In Clark *v.* Des Moines, 6 American Law Register (N. S.), p. 146, it was decided that officers, agents, or even a city council of a municipal corporation cannot bind the corporation by any act which transcends their lawful or legitimate powers.

See pages 149—150, and the numerous cases cited.
Halstead v. The Mayor, &c., 3 New York (3 Comst.), p. 430.

And the same case decided that persons dealing with the officers or agents of a municipal corporation are bound at their peril to ascertain the nature and extent of the power of those officers and of the city corporation, and that the city may avoid any act done outside the power.

See p. 154 and the cases cited, and
Thomas v. Richmond, 12 Wallace, 349, 356—357, where the law is clearly stated.
Also, Marsh v. Fulton County, 10 Wallace, 676, 683.
The Floyd Acceptances, 7 Wallace, 676.

The Supreme Court of Ohio says "the true rule is that the want of corporate power, *or the want of authority in the municipal officers*, cannot be supplied by their unauthorized acts or representations."

Treadwell v. Commissioners, 11 Ohio St. R., 183.
And see Judge Cooley's Constitutional Limitations, p. 196, and cases cited.

In the State of Illinois *v.* Delafield, 8 Paige Ch. R. pp. 527, 542, where the question was whether the State had ratified, or was estopped from denying the authority of agents who had sold its bonds contrary to law below par, it was held that the approval by the Governor of the acts of the agents, the receipt of the proceeds of the sale of a part of the bonds, and the appropriation of them, and other acts of acquiescence of executive officers of the State, were not a ratification, and that nothing short of a law of the State, proceeding from the Legislature, could legalize the transaction.

And see Delafield *v.* The State of Illinois, 26 Wendell R., pp. 191, 226—228.

In the Board of Commissioners *v.* Chitwood, 8 Indiana R., p. 504, it was decided that the board of trustees of a civil township must speak by its records, and that a certificate from the clerk of the board of trustees, not purporting to be a copy from the record, was not evidence of the action of the board of trustees.

The same case also held that an order made by the Board of County Commissioners of a county at a meeting not authorized by law, unsupported by evidence of confirmation by the Board when legally in session, was not valid, and was not evidence of any action of the Board.

And see on this last proposition, Archer *v.* Boar l, &c., 3 Blackf. 501.
Campbell *v.* Brackenridge, 8 Blackf. 471.
Butler *v.* Charlestown, 7 Gray R., 12, 14–17.

These authorities show that no importance is to be attached to the conversations between the city's officers and the contractors, nor to agreements between them not made under authority from the Board of Aldermen, nor to anything that was said or done in what were known as executive sessions, or informal meeting of the members of the Board of Aldermen, of which no records were kept.

But had the Board of Aldermen formally authorized the sale of the bonds and the scrip to the contractors at the prices that the Master charges them to T. E. Brown & Co., I should deny that the city was bound by their action, and should insist

that they must return the bonds and scrip, or account for their nominal value.

In Clark *v.* Des Moines, 6 Am. Law Reg. (N. S.), pp. 147, 157, it was decided that a city warrant executed in satisfaction of a judgment against the city at the rate of one dollar in the warrant for seventy-five cents due on the judgment, was void for usury, and, probably, that the corporation could not be bound by the action of its council in agreeing to pay a sum clearly, distinctly and ascertainably greater than was legally due.

And see the cases cited pp. 157—158.

Suppose when the Board of Aldermen loaned T. E. Brown & Co. the two hundred and seventy-five bonds, it had entered into a formal agreement that T. E. Brown & Co. should account to the city for the bonds at fifty cents on the dollar, would it be contended that such an agreement could be supported?

In view of the case just cited, and the other cases to be cited below, such an agreement could scarcely stand.

The effect of the Master's report, and of the decree of the Circuit Court, is to compel the city to do just what it never had the power *to contract* to do, viz: sell its bonds and scrip or warrants at half the sums called for by them.

It was decided in Gould *v.* Sterling, 23 New York R., pp. 439, 458—461, that where the officers of a town were authorized to borrow money on the bonds of the town, and pay it over to the officers of a railroad company on the town's subscription for stock, to be expended by them in a certain way, and instead of borrowing the money, the officers of the town delivered the bonds to the company in payment for stock subscribed, and the company sold the bonds at a discount, that the transaction was illegal.

In delivering the opinion, page 461, Judge Selden said:

"No express power to sell the bonds is given, and no such power can, I think, be implied. * * * A mere authority to a corporation to borrow money upon its bonds is equivalent, *ex vi termini*, to an authority to dispose of the bonds at par; and no further restriction is necessary."

And the Supreme Court of Tennessee, in a case not reported, Farrington *v.* The Mayor and Aldermen of Memphis, decided in 1869, decreed that the bonds of the city issued under the ordinance for funding the debt of the city, to be found in the printed record, page 206, could be exchanged for the debts of the city at par, but could not be sold, exchanged or converted at less than par, nor hypothecated for any purpose, nor applied to any purpose but the extinguishment of the debt.

I have before the court a certified transcript of the record of the case. No written opinion was delivered.

In Armstrong County *v.* Brinton, 47 Penna. St. R., p. 367, it was held that where a county paid its subscription to the stock of a railroad company in its bonds, and the bonds, in violation of the statute authorizing their issue, were sold below par, the county might compel the holder of the bonds, who was the original purchaser, to receive the sum paid for the bonds, with interest on it, in satisfaction of them.

In Kidwell *v.* The B. & O. R. R. Co., 11 Grattan's R., pages 676, 683, 696, the contractor for the construction of a bridge on the line of the railroad received his monthly payments in stock orders of the City of Baltimore, which were at a discount, and subsequently claimed that he was entitled to recover of the railroad company the amount of the depreciation of the orders.

But the court held he was not entitled to recover.

In Town of Danville *v.* Sutherlin, 20 Grattan (Va.) R., p. 555, it was decided that, where the town council sold the bonds of the city, to be issued, at public auction, for Confederate money, and for a bond of $5000.00, bearing six per cent. interest, and payable at the end of twenty years, the purchaser gave $11,050.00, Confederate currency being at the time as ten for one of gold, there was usury, and that no recovery could be had on the bond.

And the same court in City of Lynchburg *v.* Norvell, and three other cases decided at the same time, 20 Grattan R. 601, decided that where city bonds, payable thirty years after date, and bearing six per cent. *per annum* interest from their date,

sold for Confederate money at the rate of 2½ for one, when Confederate money was at the rate of twenty to one for gold, there was usury, notwithstanding the bonds were payable in the currency receivable for State taxes at the time they fell due, and that no recovery could be had on the bonds.

Six per cent. was the rate of interest allowed in Tennessee at the time of the transactions in question. Every excess over the rate prescribed was usury.

Code, Sec. 1944

A contract is not void for usury, unless the usury appears on the face of it, but a recovery may be had for the sum actually due, deducting the amount of the usury.

And where usury has been paid, it may be recovered back by the party paying it.

Code, Sec. 1955.

(*c*)

MEASURE OF DAMAGES FOR THE CONVERSION OF THE BONDS AND SCRIP.

If the amount of the city's recovery for the bonds and scrip is to be fixed with reference to the measure of damages in cases involving the conversion of negotiable securities, or negotiable paper, then the face of the bonds and scrip and interest is the true amount.

In M. & L. R. R. Co. *v.* Walker, 2 Head (Tenn.) R., p. 467, it was decided that the measure of damages in an action on an obligation for a sum of money to be paid in the bonds of a railroad company was the nominal value of the bonds, and not the value at which they might be rated in the market.

In that case, page 470, the court said:

"In the negotiations between the parties, the bonds were treated as being of their nominal value—five thousand dollars. To the plaintiff they were equivalent to that value, because their delivery was to extinguish a fixed indebtedness of the company to that amount. And to the defendant they were *prima facie* of equal value, because they were to bear interest at the legal rate until paid."

See to the same purport Lancaster *v.* Arendell, 2 Heiskell's R., pp. 434, 440, which was a case involving a promissory note.

In a case not yet reported, decided by the Supreme Court of Tennessee, a tax collector had received county scrip or warrants in payment of county taxes. He was afterwards a defaulter, and the sureties on his official bond were sued for the amount of his default. They proved that the county scrip or warrants he received were, at the time he received them, and when he converted them, worth only about sixty or seventy cents on the dollar, and could have been bought in the market for that price, and insisted that they ought not to be required to pay the county anything more than the market value of the scrip or warrants collected. But the court said that the county had to pay the scrip or warrants, dollar for dollar, and that it was entitled to recover not what its scrip or warrants sold for in the market, but the amounts they called for.

McLean and others *v.* The State and others, MS. Opinion by McFarland, J. Jackson, October term, 1878.

In Potter *v.* The Merchants' Bank, 28 New York Reports, pp. 641, 655–656, it was held that the measure of damages for the conversion of a promissory note was the amount which the maker of the note agreed to pay, and interest thereon, and not the value of the note in the opinion of witnesses.

And that it was competent to lessen the damages only by proof of the want of ability in the maker to pay the note.

In Decker *v.* Matthews, 12 New York Reports, p. 313, it was held that the maker of a negotiable promissory note was entitled to recover the amount of the note as damages from a person, who, before its legal inception, wrongfully negotiated it to a *bona fide* holder for value, *without avering or proving that he had paid the note*, it being sufficient that he was legally liable to pay it.

The case of Decker *v.* Matthews is exactly the present case, if there is no difference between the bonds of the city,

before they are put into circulation, and the note of an individual before it is delivered.

For here T. E. Brown & Co., in violation of their contracts to return the bonds at the expiration of the loans, negotiated them, and contrary to the intention of the city, put them for the first time in circulation, thereby giving them effect as obligations of the city, and putting the city under the necessity of paying them, both principal and interest, according to their terms.

And so, also, by putting the bonds overpaid them, and the bonds and scrip paid them, in the market, they oblige the city ultimately to pay the face of them.

In Coddington *v.* Gilbert, 17 New York Reports, p. 489, bonds of a railroad company, guarantied by another railroad company and a city, were in the hands of the defendants, as the agents of the company, with authority to sell a sufficient number of them to pay them (the agents) a sum of money which they had advanced for the company. The plaintiff procured the bonds to be attached as the property of the company, and the question was whether they were subject to the attachment.

The court held that the bonds, in the hands of the agents, were in no sense property of the company liable to attachment or execution.

That the fact that they were executed by a corporation, and for the purpose of being sold in the stock market to the highest bidder, did not alter the character of the instruments, or the nature of the transaction.

And Judge Pratt, delivering the opinion, p. 491, said: "If these had been the simple notes or bonds of an individual, intrusted to his agent for a similar purpose, no such experiment would probably have been tried. But they are no more liable to be seized upon attachment or execution, in consequence of having been made by a railroad company or other corporation."

I submit that this case shows there is no difference between the bonds of a corporation and the note of an individual, before

delivery; and that T. E. Brown & Co., in the present case, should be required to account for the nominal amounts of the bonds borrowed by them, and the nominal amounts of the bonds and scrip, just as the defendant was obliged to pay the face of the note he wrongfully put into circulation, in Decker *v.* Matthews.

(*d*)

T. E. BROWN & CO. CANNOT AVOID RETURNING OR ACCOUNTING FOR THE BONDS, BECAUSE THEY WERE PUT OUT BY THE OFFICERS OF THE CITY WITHOUT AUTHORITY.

T. E. Brown & Co. having received and used the bonds under the two loans, it is no excuse for their not returning or accounting for them, that the loans were without authority of law, or *ultra vires*.

Parish v. Wheeler, 22 New York Reports, pp. 494, 508–510.

Argenti v. San Francisco, 16 California Reports, pp. 255, 264-265. 282-284

The Steam Navigation Company v. Weed, 17 Barbour S. C. R., p. 378.

The State of Illinois v. Delafield, 8 Page Ch. R., p. 527, 534, and same case on error, 26 Wendell R., p. 192.

And see Bissell v. The Michigan and Northern Indiana Railroad Company, 22 New York R., pp. 258, 269-281, 305-309.

For it is morally certain that the city, by reason of the bonds having been negotiated by T. E. Brown & Co., is legally bound to pay the amount of them. The whole case proceeds upon the idea that the liability exists, and it is not even intimated that there is any escape from it.

Indeed, the decisions leave very little chance for escape in such cases.

See Lynde v. Winnebago County, 16 Wallace, p. 6; St. Joseph Township v. Rogers, 16 Wallace R., p. 644, and many former cases.

II.

ON THE CROSS-BILL.

THE RELEASE BY T. E. BROWN & CO. CONTAINED IN THE BOND LOAN CONTRACT OF NOVEMBER 20, 1868, PRECLUDED THEIR BRINGING ANY SUIT AGAINST THE CITY, OR HAVING ANY RECOVERY AGAINST IT ON THE CROSS-BILL.

The release was not absolute, but by its express terms was to be void whenever the courts of last resort decided that the property-holders were not liable to T. E. Brown & Co. for the pavement.

Printed record, p. 36—37.

No such decision had ever been made when T. E. Brown & Co. brought the suit at law against the city, nor when they filed the cross-bill, and so the release was in full force.

The city never contended for any other construction of the release than that above given. And yet the Judge of the Circuit Court, in his opinion, argued and decided the question precisely as if the city had contended, or the proper construction was, that the release was unconditional and absolute.

Printed opinion, pp. 18—20.

The Master in his report refused to give effect to the release, because he said it was "coerced from T. E. Brown & Co. in their desperate pecuniary straits, and there was no equal consideration given for it, and in equity and good conscience it ought not to stand."

And also because he said the release was conditional, and and the city did not comply with the conditions, inasmuch as it did not loan T. E. Brown & Co. $175,000 of bonds, as stipulated, and did not substitute anything else of equal value.

Printed record, p. 346, findings 8 and 9.

The Circuit Judge also put his refusal to give effect to the release on the ground that the city had not complied with its part of the contract.

Printed opinion, pp. 14—20.

(a.)

WAS THE CITY'S DELIVERY OF THE WHOLE ONE HUNDRED AND SEVENTY-FIVE BONDS A CONDITION PRECEDENT TO THE TAKING EFFECT OF THE RELEASE ON THE PART OF T. E. BROWN & CO.

I need only recur to the contract to answer this question.

Printed record, pp 36—37.

The terms proposed by the city, and accepted by T. E. Brown & Co., properly understood, mean that the release was to precede the loan of the bonds.

It was contemplated that the bonds could not be delivered at once, and hence it was stipulated that the paving accounts to be delivered as collateral security for the return of the bonds, should be delivered the city as the bonds were delivered T. E. Brown & Co.

But not so as to the release. That was an entirety, and was to be executed at once, or rather the very acceptance of the city's proposition to loan the bonds was itself the release, and no formal instrument was necessary or was executed.

The interpretation of contracts of the nature of that now being considered depends upon no technical rules, but is a matter of intention.

2 Parsons on Contracts (5th Edition), pp. 528–529 and note r.

Can it be supposed for a moment that the city would have delivered a single bond under the contract to loan, if it had not understood that the release of its liability on the paving contracts was already complete?

(b.)

THE PARTIES HAVE GIVEN A PRACTICAL EFFECT TO THE CONTRACT THAT THE COURT WILL NOT DISTURB.

But it is unnecessary to dwell upon the proper construction of the contract, considered independently of the acts of the city and T. E. Brown & Co. in reference to it. What they have done has given it a practical effect that this Court will not now disturb.

Putting the most favorable construction for T. E. Brown & Co. on what has been done, it appears that the city actually delivered them, under the loan contract, one hundred and forty of the bonds, and for the remaining thirty-five gave them a letter agreeing to deliver to them or their order that number of bonds. They accepted the bonds so delivered and the letter in place of the one hundred and seventy-five bonds. They negotiated the one hundred and forty bonds and they are yet outstanding, and have never returned, nor offered to return, any of them to the city. They also negotiated the letter for the thirty-five bonds to the Manhattan Bank, and that letter they had not returned to the city up to the time of the final decree.

These facts settle the operation that this Court is now bound to give the contract, and show conclusively that the release is in full force and effect, and that if T. E. Brown & Co had any claim whatever against the city at the beginning of this suit, it was for the thirty-five bonds called for by the letter.

See 2 Parsons on Contracts, 5th Edition, pp. 528, 531—532, note (r.) and cases cited, particularly Boone v. Eyre, 1 H. Blackst. R. 273, note (a.)
Campbell v Jones, 6 Term R., p. 570.
And see Hunt v. Silk, 5 East. R. 249.
Reed v Blandford, 2 Young & J. 278, and other cases cited 2 Parsons on Contracts, pp. 679—680, note (a.)

(c)

THE CITY DID DELIVER THE ONE HUNDRED AND SEVENTY-FIVE BONDS LOANED.

But the city did fully comply with the contract to loan the one hundred and seventy-five bonds. The receipts in the record show conclusively that it did deliver all the bonds it agreed to loan.

Printed record, pp. 298—302, deposition of Hoy, p 290, and exhibit L. to bill, p. 14.

T. E. Brown & Co. admit as much, if the letter or acceptance for the thirty-five bonds is condsidered as a substantial delivery of that number of bonds.

Printed record, pp. 279, 281, 53—54.

And after holding the letter or acceptance for the thirty-five bonds from December, 1868, or rather negotiating it at that time, and never offering to return it, or demanding the bonds instead of it, T. E. Brown & Co. ought not to be heard to say that they did not accept the letter in place of the bonds.

Again, at the time of the contract to loan the one hundred and seventy-five bonds, 20th November, 1868, T. E. Brown & Co. were indebted to the city, according to the city's account, $68,174.64 for overpayments of bonds on the "bond contracts," and according to the Master's report, $55,834.83.

Now, suppose the city did not, after the contract to loan was made, deliver the whole one hundred and seventy-five bonds, would not a sufficient number of the amount *overpaid* be considered, in a court of equity, as going to make up the amount loaned?

Or would the court say it was the duty of the city, notwithstanding the prior loan of the $68,176.64 in bonds, which was the result of overpayment, to take no notice of them, but deliver the one hundred and seventy-five, as if T. E. Brown & Co. owed the city no bonds?

(*d*)

WAS THERE A SUFFICIENT CONSIDERATION FOR THE RELEASE?

It is a settled rule of law that if the parties are capable of contracting, and there is no fraud or unfairness, the inadequacy of the consideration is no ground for interfering with the contract. The courts go further, and will even enforce specific performance of a contract without reference to the adequacy or inadequacy of the consideration.

Fry on Specific Performance, Secs. 278, 279, note (2,) 281, 284.
Hale v. Wilkinson, 21 Grattan R., pp, 75, 79, &c.
Talley v. Robinson, 22 Grattan R., p. 888.
Thorington v. Smith 8 Wallace R., p 1.

It cannot be pretended that T. E. Brown was not capable of contracting, nor that he did not fully understand the nature and effect of what he was doing when he entered into the loan contract; nor was any fraud, or unfairness used against him.

See his history of the transaction, printed record, pp. 279, 280--281.

The city was under no obligation to loan T. E. Brown & Co. one hundred and seventy-five bonds. T. E. Brown & Co. were certainly the best judges of the value of the loan to them. If they considered the value of the loan a sufficient consideration for making the conditional release to the city, is there anything before the court that authorizes it to say that the consideration was not sufficient?

If the release was the discharge absolutely and entirely of a debt that the city owed, for a less sum than was due, then the antiquated principles of the common law might afford some pretext for the position that the release was without consideration and void.

But the contract was nothing more than the compromise for the time of a doubtful question, viz: whether the city was liable under the paving contracts for the cost of the pavement in front of private property. The decision of this question was agreed to be in favor of the city, unless the courts of last resort should decide that the property holders were not liable to T. E. Brown & Co. for the pavement, and in that case, the question was to be open, and be subject to settlement by suit.

That there was an actual dispute as to the city's liability, and that it was the subject of negotiation between the parties, and that the city made and T. E. Brown & Co. accepted the loan of the bonds with a view to the settlement of the dispute does not admit of a doubt.

Printed record, pp. 279, 280-281.

Even at common law, such a contract would be upheld and enforced.

See note to Cumber v. Wane, 1 Smith's Leading Cases, * pp. 470, and cases there cited.
Harper v. Graham, 20 Ohio R. 105.
Garnett v. Macon, 2 Brockenbrough R., p. 185.

The Code of Tennessee, in force since the year 1858, sections 3789 and 3790, provides:

"§ 3789. All receipts, releases and discharges in writing, whether of a debt of record or a contract under seal, or other-

wise, shall have effect, according to the intention of the parties thereto.

"§ 3790. All settlements in writing, made in good faith, for the composition of debts, shall be taken as evidence, and held to operate according to the intention of the parties, although no release under seal is given, and no new consideration has passed."

And section 1805 provides: "All contracts in writing, hereafter made and signed by the party to be bound, or his authorized agent and attorney, are *prima facie* evidence of a consideration."

I submit that these provisions of the statute are conclusive as to the effect of the release, so far as it depends upon the sufficiency of the consideration for it.

(e)

DID T. E. BROWN & CO. MAKE THE RELEASE UNDER CIRCUMSTANCES THAT AMOUNTED TO DURESS, OR COERCION?

It has been noticed that the Master says that T. E. Brown & Co. were coerced into making the bond loan contract. He does not say what the coercion consisted in, unless we are to understand him as meaning that "their desperate pecuniary straits" coerced them.

There was certainly no other ground for stating that T. E. Brown & Co. were coerced.

The Circuit Judge did not state that ground as a reason for his decision *but intimated* that it might be a sufficient ground for it, if there were not other conclusive grounds.

That there is nothing in the record to show any thing in the nature of duress is too plain for argument, and I will refer only to a few cases.

In French *v.* Shoemaker, 14 Wallace, R. 314, the syllabus is: "Equity will not set aside a contract whose purpose is the settlement of disputes, simply because one party to it was in want of money when he made it, and because such want may

have been an inducing cause for his making it; the party having been an intelligent person, who acted deliberately and with knowledge of what he was doing."

See particularly the remarks of Justice Clifford, delivering the opinion, pp. 233—235.

And in Stover *v.* Mitchell, 45 Illinois R., pp. 213, 217, the court held that in order to make a payment on a compromise compulsory, such a pressure must be brought to bear upon the person paying as to interfere in some way with the free enjoyment of his rights of person or property.

See United States *v.* Huckabee, 16 Wallace, 414, 431—432, on the question of duress.

And see May *v.* Le Claire, 11 Wallace R., p. 217, on the subject of compromise.

[2.]

THE CITY IS NOT LIABLE FOR ANY PORTION OF THE PAVING LAID DOWN BY THE CONTRACTORS IN FRONT OF PRIVATE PROPERTY.

CASH CONTRACTS.

It has been shown in the statement of the case that there was no direct undertaking by the city in the "cash contracts," or those made with Taylor, McBean & Co., to pay for any paving done in front of private property.

All such paving, by the terms of the contracts, was to be paid for by the owners of the lots fronting the paving.

Printed record, pp, 25, 91.

It has also been shown that this mode of paying for the paving, was in exact accordance with the provision of the charter of the city on that subject, and of the ordinance under which the contracts were made.

It is also an admitted fact in the record that the city has more than paid for all the paving done under the "cash contracts" in front of the public property, and at the intersections of the streets and alleys.

The express liability of the city for the work done under the "cash contracts" rests, therefore, exclusively upon the provision by which the city undertook to guaranty to the contractors the payment of the paving accounts as assessed against the property owners for the pavement.

Printed record, pp. 25, 91.

If the guaranty is not obligatory upon the city, then it is under no obligation as respects the paving done in front of private property under the "cash contracts," unless the law imposes an obligation independent of *any contract*.

BOND CONTRACTS.

In reference to the "bond contracts," it has been shown in the statement of the case that the undertaking of the city was direct to pay the contractors for the entire paving done, in the bonds of the city at par.

Printed record, pp. 33, 81.

There was no undertaking in the "bond contracts" by or for the property owners, or any one else but the city; and hence, there was not, and in the nature of things could not be, any provision by which the city undertook to guaranty the payment of the paving accounts.

When the "bond contracts," by a subsequent contract between the city and the contractors, came to be modified so as to provide that "the amounts fixed as the prices of the paving to be done, were to be assessed and collected *from the property-holders* whose property abutted the streets *in the manner and form* prescribed by the contracts with Taylor, McBean & Co.," the "cash contracts,"—instead of being paid by the city in its bonds, as provided in the "bond contracts," it was not stipulated that the city would guarantee to the contractors the payment of the paving accounts, as assessed against the property-owners.

Printed record, pp. 34-35.

Neither was the guaranty provision, as contained in the "cash contracts," adopted by the modification so as to be made a part of the "bond contracts," as modified.

The provision in the modification on the subject is, "which contracts [the "cash contracts"] so far as relates to the conditions *herein set forth* shall bind the parties."

The modification begun by stating that the "bond contracts" should "be altered and modified as follows, to-wit:" and subsequently set out the alterations and modifications particularly.

Nothing whatever was said in the modification as to a guaranty by the city of the payment of the paving accounts against property owners, but there is a provision immediately preceding the statement of the modifications and alterations, that the streets should be paved within the terms specified in the "bond contracts," according to the contracts, "with all the conditions, forfeitures and limitations therein set forth, saving and excepting such modifications and alterations as are herein set forth, to-wit:" and they are then stated.

It seems to me that the modification must have been drawn with special reference to the provision for the guaranty contained in the "cash contracts," and with the intention to omit it.

Language better calculated to exclude it, without expressly mentioning it, could scarcely have been employed.

Besides, if the provision for the guaranty was intended to be embraced in the contracts, its importance altogether precludes the idea that the parties would have left it to depend upon construction or inference.

If I am right as to the absence of a guaranty provision in the bond contracts, after the modification, then the modification undoubtedly discharged the city from primary liability for the paving to be laid down under the "bond contracts" in front of private property, and no recovery can be had of the city for such paving done after the modification under the "bond contracts," unless there is some implied liability.

This embraces all the work done on Main, DeSoto, Shelby, Beal and Poplar streets, Charleston avenue and Old Madison street, in front of private property.

Printed record, pp. 34-35, 47 and 113.

And as it is admitted, as well as proved, that the city has much more than paid for all the paving done under the "bond contracts" in front of public property, and at the intersections of the streets and alleys (printed record, pp. 5, 15, 51 and 849), it follows that the only question necessary to be discussed in reference to the city's liability for the paving done under the "bond contracts" in front of private property, is whether, under the facts in the record, there is any implied liability on the part of the city to pay for the work?

(*a*)

GENERAL RULE AS TO POWER OF MUNICIPAL CORPORATIONS TO MAKE CONTRACTS.

I assume it is settled that the city cannot make *any* contract, unless the power to make it is expressly conferred by its charter, or is necessarily incident to the exercise of some granted power.

Hodges v. The City of Buffalo, 2 Denio R., pp. 110, 112.
Moss v. McCullough, 5 Denio R., pp. 567, 579-581.
Halstead v. The Mayor, 3 New York R., pp. 430, 433-434.
Marsh v. Fulton County, 10 Wallace. 676, 681.
Boom v. Utica, 2 Barbour S. C. R., pp. 104, 107-108.
Seibrecht v. New Orleans, 12 Louisiana An. R., pp. 496, 497.
Donovan v. The Mayor, &c., 33 New York R., pp. 291, 293.
Gosler v. Georgetown, 6 Wheaton, p. 593.
Nichol v. Mayor, &c., 9 Humph. R., pp. 252, 261.
Adams v. The M. & L. R. R. Co., &c., 2 Coldwell, pp. 545, 554, 555.
City of Memphis v. Memphis Gayoso Gas Company, Memphis Ordinances, 1873, pp. 261, 262.
Thomas v. Richmond, 12 Wallace R., 349, 353.
Pennsylvania R. R. Co. v. Philadelphia, 47 Penn. State R., p. 189.

(7)

MUNICIPAL CORPORATIONS IN EXERCISING GRANTED POWERS MUST PURSUE THE MODE PRESCRIBED BY LAW, IF A MODE IS PRESCRIBED.

I assume, also, that it is now equally well settled that where a municipal corporation is empowered by its charter to do a particular thing, and the manner of doing that thing is prescribed by law, the corporation must do it in the mode prescribed, and that any attempt to do it in a way different from the prescribed way is void.

This principle, as applicable to the mode of making contracts, even by private corporations, was recognized by this court in Head *v.* The Providence Ins. Co., 2 Cranch R., p. 127, where Marshall, Ch. J., delivering the opinion, page * 169, said: "The act of incorporation is to them [corporations] an enabling act; it gives them all the power they possess; it enables them to contract; and when it prescribes to them *a mode* of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated."

This case was approved in the Bank of the United States *v.* Dandridge, 12 Wheaton, 64, where, at page 68, Judge Story delivering the opinion, said; "But whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend, both for their powers *and the mode of exercising them*, upon the true construction of the statute itself."

And the doctrine is much more rigidly adhered to and enforced in cases involving the power of municipal corporations to make contracts.

For examples see Argenti v. San Francisco, 16 California R., pp. 255, 282-284.

McCracken v. San Francisco, 16 California R., pp. 591, 618-621.

Zittman v. San Francisco, 20 California R., p. 90.

Piemental v. San Francisco, 21 California R., p. 351.

Day v. Jersey City, 19 New Jersey Eq., p. 412.

Baltimore v. Reynolds, 20 Maryland R., p. 1.
Brady v. The Mayor, &c., of New York, 20 New York R., p. 312.
Hague v. Philadelphia, 48 Penn. St. R., p. 527.
Reilly v. Philadelphia, 60 Penn. St. R., p. 467.
Starin v. Genoa, 23 New York R., pp. 439, 453–455, 458–461.
Leavenworth v. Rankin, 2 Kansas R., p. 357.
White v. New Orleans, 15 Louisiana An. R., p. 667.
Fox v. New Orleans, 12 Louisiana An. R., p. 154.
Seibrecht v. New Orleans, 12 Louisiana An. R., p. 496.
Donovan v. The Mayor, &c., of New York, 33 New York R., p. 291.
Herzo v. San Francisco, 33 California R., p. 145.

(c)

PROVISION FOR GUARANTY PUT IN PAVING CONTRACTS WITHOUT AUTHORITY.

The portion of the charter under which the contracts for laying down the pavement, and charging the cost of it to the owners of the abutting property, were made, has already been copied in the statement of the case, and may be seen in Memphis City Ordinances for 1867, pages 214—216.

The ordinances authorizing the contracts, and levying the assessments to pay the cost of paving, have also been copied, and may be seen in the printed record, pages 99—100, 116—117.

Neither the charter nor the ordinances authorize a provision in the contracts by which the city should guarantee the payment of the paving accounts as assessed against the property-owners for paving done in front of their property.

Nor is there anything in the record to show that the Board of Aldermen, in whom, together with the Mayor, the legislative power of the city was vested (Memphis City Ordinances for 1867, p. 185), ever at any time authorized or sanctioned the inserting of the provision for the guaranty in the contracts.

It is apparent that the effect of the guaranty by the city of the payment of the paving accounts of the property-owners, if it was operative, was to place the burden of paying for the pavement upon the tax-payers of the city generally, and to

withdraw it from the owners of the property abutting the pavement laid down, upon whom it was the policy of the charter, and the ordinance, and of the city in making the contracts, to impose it.

I insist, therefore, that the guaranty provision in the contracts was put there without authority from the city, and that it was directly opposed to the provisions, as well as the policy of the charter and the ordinances under which the contracts were made, and for both these reasons, is void.

(d)

CITY HAD NO POWER TO GUARANTY PAYMENT OF PAVING ACCOUNTS.

By the contracts, as well as by the charter and ordinances under which they were made, the owners of the property abutting the pavement laid down were the primary or principal debtors to the contractors for the price of the paving done.

The guaranty provision itself assumed, and indeed the necessity or occasion for it arose from, that very fact.

The undertaking of the city by the guaranty was the undertaking of surety only.

Nothing in the city's charter authorized it to become the surety of the property-owners, or the surety of any one.

I insist, therefore, that for this reason the provision for the guaranty by the city was void.

It is quite immaterial that the paving of the streets was a municipal object, and that possibly the city might have paved the streets and paid the cost out of its general revenues.

Admitting all this to be so, still the law would not permit it to become the surety of the property owners for the cost of the pavement.

Judge Dillon, Municipal Corporations, sec. 393, says:

"A municipal corporation cannot, without legislative au-

thority, become surety for another corporation or individual; cannot guaranty the bonds or obligations of another, or make accommodation endorsements. Such an authority can not be implied or deduced from the general and usual powers conferred upon such corporations. Although such a corporation may have power directly to accomplish a certain object, and itself expend its revenues or money therefor, yet it does not give or include the power to lend its credit to another who may be empowered to effect the same object. Expending money by a city council, as agents or administrators of their constituents, is a very different thing from binding their constituents by a contract of suretyship—'a contract which carries with it a lesion by its very nature'."

The authorities fully sustain this statement of the law.

Louisiana State Bank v. Orleans Navigation Company, 3 Louisiana An. R., p. 294.

Clark v. Des Moines, 19 Iowa R 199, 224, 6 Am. Law Reg. (N.S.) pp. 146, 158—159.

Chamberlain v. Burlington, 19 Iowa R. 395.

Smead v. Railroad Company, 11 Indiana R. 105.

(e)

AS TO THE CITY'S IMPLIED LIABILITY TO PAY FOR PAVING IN FRONT OF PRIVATE PROPERTY.

By reference to the provision of the charter under which the contracts charging the cost of the paving upon the abutting property were made, it will be seen that it is first provided that "the cost shall be borne by the owners of the adjoining property," and secondly, that "the owners of the lots charged with the cost shall be bound to pay the same like liabilities contracted by themselves, and may be sued therefor."

Memphis Ordinances for 1867, pp. 214, 215.

The record does not show that the abutting property, or its owners, cannot be made to pay the portions of the cost assessed upon them respectively.

So far as decisions in the suits that have been brought have been made, they are in favor of the contractors, and against the property owners.

The record shows that the property owners have not paid up the amounts due from them.

But it does not show that the city has been instrumental in bringing about their default, or that it has neglected doing anything that it ought to have done in order to compel them to make payment.

It is true that the City Attorney did not bring suits on the paving accounts, as the charter, the ordinance, and the contracts said he should do, but the contractors retained all the paving accounts, took the bringing and prosecution of the suits upon themselves, and employed counsel for the purpose, and have now no right to complain that the city did not bring the suits.

It may be that the City Attorney ought to have brought suits on the paving accounts deposited as collateral security for the return of the bonds loaned T. E. Brown & Co.

Printed record, 289.

But, if he neglected to perform his duty to bring the suits, he ought to have been compelled to do it by mandamus; and, even supposing the city is chargeable for his default, it could not, on that ground alone, be made to pay the full amounts of the paving accounts that he ought to have sued upon.

Besides, it is exceedingly doubtful whether the mere delay to bring the suits, no actual loss of the paving accounts, or any part of them, being shown as the result, would be a sufficient ground for an action for damages, either against the City Attorney personally, or the city.

And, as long as the city held the paving accounts not sued upon, as collateral security for the return of the bonds that it had loaned T. E. Brown & Co., it is not seen how T. E. Brown & Co. could have a right to demand that suits be brought by the city upon them, or could have a cause of action against the city if suits were not brought. Had they returned the bonds loaned, and thereby released the city's claim upon the paving accounts, it might have been different.

It may be important to call attention to the fact that a large number of the paving accounts were not turned over to the City Attorney by T. E. Brown & Co. till November, 1870, a long time after the suit at law by T. E. Brown & Co., against the city had been commenced.

Printed record, pp. 289-290, 180.

And $100,000.00 of them were turned over to the city on the hearing before the Master.

Printed record, p. 355.

Up to about the time that this litigation commenced, the city and the contractors construed the paving contracts to mean that the paving accounts belonged to the contractors; that the property owners and not the city were their debtors; that it was their duty to collect the accounts, and that the proceeds, when collected, belonged to them. The guaranty in the "cash contracts" was the only provision out of which it was supposed *by the contractors* that the city's liability for the paving accounts of the owners of property arose. The city disputed its liability, and the question was settled for the time by the bond loan contract of the 20th November, 1868.

The proof of what has just been said is, that the contractors never at any time demanded that the city pay the paving accounts due by the property holders, while the city paid them regularly and promptly for all the paving done at the intersections of the streets and alleys and in front of public property. In August and November, 1868, when in need of money, instead of applying to the city for payment of what it owed them, if it really was their debtor, T. E. Brown & Co. applied to the city for loans of its bonds, to be returned at the end of specified periods. And to secure the loans, they deposited with the city the paving accounts as collateral security. Of course, if the parties had considered that the paving accounts did not belong to T. E. Brown & Co., or that they belonged to the city, they would not have been given or accepted as security for the return of the bonds.

The contractors retained all the paving accounts up to the time of the last loan of bonds in November, 1868, and they collected every dollar that ever was collected on them, and have never paid a cent of it to the city, nor rendered an account.

All the suits against the property owners were brought in the names of the contractors, by their private attorneys, and the city was neither a plaintiff nor a defendant in them.

Printed record, pp. 358–363, 353–354, finding ten of the Master.

Besides, the difference between the "cash" and the "bond contracts," and the modification, by which the property owners became liable, instead of the city, to the contractors for paving to be thereafter laid in front of private property under the "bond contracts," show that contractors looked to the property owners and not to the city for payment under the "cash contracts."

It is not necessary to argue the question whether the city had the power to make a contract binding itself directly to pay for the laying of the pavement in the streets.

It is possible that the mode prescribed in the charter by which the cost was to be assessed upon the abutting property, excluded any other mode of providing for the cost of paving.

But, for present purposes, I will admit it did not, and that the city could lawfully have made a contract binding itself to pay for the laying of the pavement.

It is sufficient to say that in the present case no such contract was made. On the contrary, the contracts made expressly charged the cost of the paving on the abutting property, and did not attempt or profess to impose any liability on the city, except as guarantor for the property owners.

Neither is it material whether the doctrine of Argenti v. San Francisco, 16 California R. 255, that the city is primarily liable for the cost of the pavement, and must pay the contractor, and must look to the owners of the abutting property for re-imbursing itself the amount paid out, could be correctly applied to the charter of Memphis.

For in that case, as I understand it, the city had expressly contracted to pay for the pavement (see p. 277), and had actually collected the assessments of the property-owners (p. 282), while in this case the contracts expressly stipulate that the contractors were to collect from the property-owners, and contain no provision that the city was to collect from the property owners, or was to pay the contractors.

I insist that there is nothing whatever in the record justifying a recovery by T. E. Brown & Co. against the city of the amount of the cost of the paving done in front of private property, or any part of it.

Judge Dillon says (Sec. 883, Municipal Corporations):

"So, where the corporation orders local street improvements to be made, for which the abutters are the parties ultimately liable, and which by the charter must be made in a prescribed mode, if made without any contract, or a valid one, the doctrine of implied liability does not apply in favor of the contractor, *unless, indeed, the corporation has collected the amount from the adjoining owners, and has it in the treasury.*"

There are cases which hold that if the city has actually collected the cost of the pavement from the abutting property owners, the contractors may maintain an action against the city to recover it.

Such cases are not authority for a recovery against the city in this case, as it is not pretended that the city has collected any part of the cost of the pavement from the owners of the property.

Printed record, p. 356, finding 22 of the Master.

There is another class of cases which hold that the city is liable where there is a total want of power in the city to make the assessments on the abutting property, and where, in consequence, the contractors are not able to collect from the property-owners.

But *query* as to these cases? Do they not in effect hold that the corporation by its contract *ultra vires* makes itself liable?

And see Baltimore v. Lefferman 4, Gill R. 425, Morris v Baltimore, 5 Gill R. 244.

But there is no claim in the record in this case that the city had no power to make the assessments, and no proof from which a want of power can be inferred.

And there are cases where the city has been guilty of neglecting some duty imposed upon it by its contract or the law, whereby the contractors have been prevented from collecting the cost of the work from the abutting property-owners, in which recoveries have been had for the cost against the city.

But it is believed that no case can be found where a recovery has been had upon the simple ground that the property owners have not paid the amounts due from them.

In Fox *v.* New Orleans, 12 La. Am. R. p. 154, certain work was to be done which the charter required to be let to the lowest bidder. The surveyor made a contract for the doing of the work without having let it out to the lowest bidder. After completing the work, the party doing it sued and was defeated, both as against the property-owners, on whom the cost of similar work was a direct charge, and the city, because the contract had been made in disregard of the provisions of the charter.

In the City of Leavenworth *v.* Rankin, 2 Kansas R. p. 357, the charter authorized the city to charge the cost of paving the streets upon the adjacent property, but provided the consent of a majority of the resident owners to be affected thereby was to be first obtained. An ordinance required the consent to be expressed by a petition to the Council before the contract should be let, and that the contract should contain a stipulation that the city should in no event be liable for the cost of the work. A contract was made for the grading of a street, signed by the contractor and the Mayor of the city, and sealed with the city's seal, without the requisite petition from the property owners, and without a clause that the city was in no event to be liable. On the contrary, the contract provided that the city would pay the contractor for the grading according to the charter and ordinances of the city. The contractor did the work he contracted to do. The manner of paying, by the

charter and ordinances, was to issue to the contractor certificates upon which he might collect his pay from the owners of the real property liable. The city neglected and refused to issue the certificates. The contractor sued the city for the value of the work done, alleging that it had not taken the steps necessary to charge the real estate with the cost, and therefore was liable.

The Court held that the contractor was not entitled to recover.

In Goodrich *v.* Detroit, 12 Michigan R., p. 279, it was decided that the city could not make itself responsible for the price of any public work, the law requiring it to be paid for by the property-owners, upon whom its cost was to be specially assessed, and that such work could only be paid for by the city by funds actually in the hands of the City Treasurer provided for the specific purpose by means of special assessments.

And see Rhinelander *v.* The Mayor, &c., 21 Howard's Pr. R. p. 304.

In McCullough *v.* The Mayor, &c., 23 Wendell R., p. 457, it was decided that an action could not be maintained against a city by an owner whose property was taken for a street, to recover the amount awarded him for compensation, unless it was shown that the persons benefited had paid the sums assessed upon them to the city.

And see Hunt *v.* Utica, 18 New York R. p. 442.

In Lovell *v.* St. Paul, 10 Minnesota R., p. 290, it was decided that a contractor who had done grading on a street which by law was made a charge upon the property benefited, could not recover of the city the value of the work done, although the city had caused the property charged to be sold for the said assessments and other taxes, and had become the purchaser of it, and thereby had become the owner. And Finney *v.* Oshkosh, 18 Wisconsin R., p. 209, is to the same effect.

In New Albany *v.* Sweeney, 13 Indiana R., p. 245, a contractor, for improving a street under a law which provided that the cost should be collected of the abutting property, after hav-

ing sold a certain lot for less than the assessment upon it, sued the city for the deficiency, and it was held that he could not recover.

And see Lucas v. San Francisco, 7 California R. 463.

A contractor, under the law referred to in the case last cited, sued a city for work done in grading and graveling a street on the grounds that the city council had made the contract without authority, and, therefore, had failed to charge the property, and the property-holders refused to pay, and the city refused to sue them. It was held that he could not recover.

Johnson v. Indianapolis, 16 Indiana R., 227.
And see Swift v. Williamsburgh, 24 Barbour, 407.

In Argenti v. San Francisco, 16 California R., pp. 255, 259, it was held that the improving of particular streets is local, and though to some extent a general benefit, yet is chiefly for the benefit and advantage of the immediate neighborhood, and does not constitute that kind of general advantage to the city from which a liability to pay for the same can be inferred—the general doctrine, that when one takes a benefit which is the result of another's labor, he is bound to pay for the same, not applying to such cases. See page 288.

See also Murphy v. Napa Co., 20 California R., p. 497.
Baltimore v. Porter, 18 Maryland R., 284.
Estey v. Inhabitants of Westminster, 97 Mass. R., 324, 325—326, and note.

In Reilly v. Philadelphia, 60 Penn. St. R., 467, it was said by the Supreme Court of Pennsylvania that a contractor paving a street, not being selected by a majority of the property-owners of the front to be paved, who were chargeable with the cost, which was a prerequisite to the making of the contract, was a mere volunteer, and could not recover for the paving done, either from the city or the owners.

In Brady v. The Mayor, &c., 20 New York R., pp. 312, 319, it was left undecided whether a contractor performing work under a contract void for a failure to comply with the statutes,

could, in any case, maintain an action against the city to recover a *quantum meruit*, where the work has been accepted by the city, and has gone into use for public purposes, though a recovery was denied in the particular case, which seems to have been an action upon the special contract.

But in Donovan *v.* The Mayor, &c., 33 New York R. p. 291, a similar case, the question was decided, and it was held that no recovery could be had, even for the value of the work, although, as Judge Porter said, the case was a hard one.

In his opinion, the Circuit Judge relied upon the Gas Company *v.* San Francisco, 9 California R., p. 453, and quoted the remark of Ch. J. Field that "The city is impliedly bound and liable whenever justice demands it to be," and from it, and other cases of a somewhat similar character, argued that a liability of the city to pay the contractors for the paving ought to be implied in this case.

In Zottman *v.* San Francisco, 20 California R., pp. 96, 108, Ch. J. Field said that the decision in the Gas Company *v.* San Francisco was placed upon the pleadings, and that it was authority only upon a question of pleading. He alluded to the fact that he had discussed the merits of the case, and said "there are some expressions in the opinion which may be open to observation."

In Zottman *v.* San Francisco, one of the best reasoned cases to be found anywhere, the court held that the corporate authorities could not ratify a contract made in a way different from that prescribed by law, and that where the mode of making a contract was prescribed, a corporation was not liable for work done, which had not been done under a contract made in the mode prescribed, and that the doctrine that one taking the benefit of the work of another, must pay for it, had no application to such a case.

See 20 California, pp. 105—109.

[8.]

THE SUMS ALLOWED T. E. BROWN & CO. FOR THEIR SERVICES IN COLLECTING THE PAVING ACCOUNTS, AND FOR SUMS PAID ATTORNEYS FOR SERVICES IN CONDUCTING THE SUITS ON THE PAVING ACCOUNTS WERE WRONGFULLY CHARGED TO THE CITY.

Included in the decree, as already shown, are charges against the city of $10,000 paid attorneys employed to prosecute the suits, and $25,000 for services of T. E. Brown & Co. in collecting the paving accounts without process.

Printed record, p. 349.

These items are objected to in the city's exceptions, paragraph XIV, clauses 5, 6, 7, 8, 9, 10, 11 and 12, printed record, pages 371—372.

The facts are, that the contractors, T. E. Brown & Co., at the verbal suggestion of R. J. Morgan, the City Attorney, and Mayor Leftwich, employed a firm of attorneys to assist the City Attorney in collecting the paving accounts by suit.

Printed record, pp. 250, 261, 278, 280.

Another firm of which R. J. Morgan, the City Attorney, was a member, was also employed by T. E. Brown & Co. to aid in the collecting of the paving accounts, and $2300 of the $10,000 claimed to have been paid by T. E. Brown & Co. was paid to that firm.

Printed record, pp. 280, 279.

The Board of Aldermen never at any time employed, or authorized T. E. Brown & Co., or any one else, to employ counsel to assist the City Attorney in the prosecution of the suits on the paving accounts.

Printed record pp. 280—281.

All the suits brought on the paving accounts were brought in the name of Taylor, McBean & Co. to the use of T. E. Brown & Co., and not one of them was brought in the name of the city.

Printed record, p. 355, paragraph XIX, caption to exhibit "A," pp. 358—363.

The services that were rendered by the com[illegible] the Finance lecting, and endeavoring to collect, the paving acc[illegible]ify or waive out process of law, the city claims were rendered [illegible] add any contracts, and T. E. Brown & Co. claim were rendered verbal suggestion of the Mayor and City Attorney. [illegible] Al-

Printed record, pp. 278, 280, 250, 260—261, 25, 91.

The Board of Aldermen never at any time authorized or requested T. E. Brown & Co. to perform those services.

Printed record, pp. 280, 281.

(a)

THE CITY NOT LIABLE TO PAY FOR THE SERVICES OF T. E. BROWN & CO. IN COLLECTING THE PAVING ACCOUNTS.

By the terms of the "cash contracts," and the modification of the "bond contracts" adopted the same provisions, (printed record page 35,) the contractors, as each section of pavement was completed, were to receive from the City Engineer, for collection, the accounts for the pavement against the property-owners, and were to receive from the property-owners one-half the price in cash, and for the remaining one-half, the notes of the property-owners, to be paid in thirty, sixty and ninety days, secured by the lien fixed by the city charter, and if the accounts were not paid, according to the above terms, within ten days after the payments became due, those unpaid were to be placed in the hands of the City Attorney for collection under the city charter

Printed record, pp. 25, 91.

No provision was made in the contracts as to the compensation the contractors were to receive for collecting the accounts, nor was it said whether they were to receive anything.

T. E. Brown & Co. put in a claim against the city, and the Master has allowed them $25,000 for collecting the accounts.

Printed record, pp. 349 and 353.

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Printed record, p. 355, paragraph XIX, caption to exhibit "A," pp. 358—368.

The services that were rendered by the contractors in collecting, and endeavoring to collect, the paving accounts, without process of law, the city claims were rendered under the contracts, and T. E. Brown & Co. claim were rendered at the verbal suggestion of the Mayor and City Attorney.

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Printed record, pp. 349 and 353.

The claim seems to be for extra services, outside those contemplated by the contracts, it being tacitly admitted that for

services embraced by the contracts, T. E Brown & Co. have no right to compensation.

It is not claimed that the Board of Aldermen ever employed, or requested T. E. Brown & Co. to perform the services, but the Master states that the Mayor, City Attorney and Finance Committee requested them to perform them.

Printed record, p. 353.

I insist, first, that T. E. Brown & Co., in collecting or attempting to collect the paving accounts of the property-owners, were performing services for themselves, and not services for the city, and that they have no right to ask the city to pay them therefor.

The contracts prescribed the part the contractors were to perform, and the part the city was to cause to be performed, in the collection of the paving accounts.

By the contracts, as soon as ten days elapsed after the payments became due, the paving accounts were to be placed in the hands of the City Attorney for collection.

Until the expiration of the ten days, the contractors retained the accounts, and, of course, did what they thought proper to collect them.

Now, if the contractors chose to retain the paving accounts beyond the ten days, and to perform services in trying to collect them, not contemplated by the contracts, it could hardly be claimed that the city should pay for those services, when it had a salaried officer whose duty it was, both by the contracts and the law (Memphis City Ordinances for 1867, p. 215, and p. 328, Secs. 5, 6 and 7), to perform them.

And, indeed, as already stated, T. E. Brown & Co. do not rest their claim upon any such assumption, but they assert that they were in fact employed, outside the contracts, by the Mayor, the City Attorney and the Finance Committee, and that, by reason of such employment, the city ought to pay them for their services.

I deny that the Mayor, the City Attorney, or the Finance Committee, singly or combined, could alter, modify or waive for the city any provision of the contracts, or could add any provision to them.

The legislative power of the city was in the Board of Aldermen, together with the Mayor.

Memphis Ordinances for 1867, p. 185, Sec. 2.

And the ordinance required the Board of Aldermen to make contracts for the paving of streets, and the contracts to be signed by the Mayor and the contractors, and filed in the office of the City Comptroller.

Memphis Ordinances for 1867, p. 327, Sec. 8.

The contracts as entered into, and the provisions of the ordinances, as well as the provision of the charter, under which the contracts were made, were in effect laws to the contractors and to the city in doing what the contracts required to be done.

And it was not in the power of any officer or agent of the city, and probably would not have been in the power of the Board of Aldermen, to alter or waive the provision of the contracts which required the paving accounts to be handed to the City Attorney for collection.

Hague v. Philadelphia, 48 Penn's St. R., pp. 527, 529–530.
Dillon on Municipal Corporations, Sec 245, and note 2, Sec. 372.
Bonesteel v. The Mayor, etc., 22 New York R., 162.
Zottman v. San Francisco, 20 California R., pp. 96, 99–105.

Independently altogether of the contracts, and of every thing contained in them, I insist that neither the Mayor, the City Attorney, nor the Finance Committee, nor all of them acting in concert, had authority to employ, or request the contractors to perform, the services for the city, or to bind the city for their payment, and that T. E. Brown & Co. cannot recover for their services against the city, even supposing everything the Master reports respecting their employment to be true.

Halstead v. The Mayor, etc., 3 New York (3 Comst.) p. 430.
Delafield v. The State of Illinois, 2 Hill (N. Y.) R., pp. 159, 175, etc.
Zottman v. San Francisco, 20 California R., 96, 101–105.

In Philadelphia *v.* Flanigen, 47 Penn'a St. R., p. 21, it was decided that the power of making contracts to bind the City of Philadelphia was vested in its legislature, styled the councils, and that the heads of departments of the city government had no such power, and that a party who had printed advertisements of delinquent tax-payers in a newspaper, at the request of the receiver of taxes for the city, could not recover of the city his compensation.

And in Lowell *v.* Simpson, 10 Allen (Mass.) R., p. 88, it was held that the Mayor of a city had no authority to grant a license, in a case where an ordinance of the city prohibited the granting of the license, except by the Mayor and Aldermen.

In Seibrecht *v.* New Orleans, 12 La. An. R., p. 496, it was decided that the city was not bound by contracts made by those not authorized to represent it, and that it was bound by no contract made without its authorization expressed by a resolution of the Common Council.

In that case a party was denied compensation for carpets sold by him, and actually w rn out on the floors of the city's court-rooms, because they had been ordered by a person not authorized to buy for the city.

And see Estey *v.* Inhabitants, etc., 97 Mass. R. 324.

(*b*)

THE CITY NOT LIABLE TO PAY SUMS PAID OUT BY T. E. BROWN & CO. FOR SERVICES OF ATTORNEYS IN CONDUCTING SUITS AGAINST THE PROPERTY OWNERS ON THE PAVING ACCOUNTS.

The city charter provided for a City Attorney, who should perform such duties as might be provided by ordinance.

Memphis City Ordinances for 1867, p. 194, Sec. 33.

The charter also contained a provision that the digest of the ordinances of the city, published under the direction of the Mayor and Aldermen, should be read as evidence in all the courts of the State, without proof.

Memphis Ordinances for 1867, p. 282, Sec. 2.

Among the duties required by ordinance of the City Attorney, was the prosecution and defence, as the case might require, of all suits to which the city might be a party, or in which the city was interested in any court of record in the city or Shelby county, or in the Supreme or Federal courts of Tennessee.

Memphis Ordinances for 1867, p. 250, Sec. 8.

As already shown, the provision of the city charter under which the contracts were let, expressly provided that the City Attorney should collect the paving accounts.

Memphis Ordinances for 1867, pp. 196, 215.

The ordinance on the subject more specifically prescribed the City Attorney's duties in respect to the collection of the paving accounts.

Memphis Ordinances for 1867, p. 328, Secs. 5, 6 and 7.

And the paving contracts, as already shown, provided that the paving accounts, if not paid as provided in the contracts, were to be placed in the hands of the City Attorney for collection under the city charter.

Printed record, pp. 25, 34—35 and 91.

I insist, first, that the contracts fixed the obligation of the city as to providing an attorney, by requiring that the City Attorney should collect the paving accounts; and in the second place, that the Mayor, the City Attorney, or any other city officer, had no power, independent of the restrictions of the contracts, to employ attorneys on behalf of the city to collect the paving accounts.

In Carroll *v.* St. Louis, 12 Missouri R., p. 444, it was decided that the Mayor of St. Louis had no authority to appoint an attorney so as to make the city liable for his services.

And in Butler *v.* Charlestown, 7 Gray (Mass.) R. 12, it was decided that a city was not liable for legal services, beneficial to it, performed by counsel retained by a majority of the members of the Board of Aldermen, without any official action of

either branch of the City Council, although the usage of the city had been to pay such bills, approved by a committee of either board, without any formal vote.

And Clough *v.* Hart, 11 American Law Register (N. S.) 95, decided that there was a *prima facie*, if not absolutely, an implied restriction upon the city and county corporations to employ other attorneys to perform the precise duties, as prescribed by law, of the city and county attorneys elected by the people, or provided for in incorporating statutes.

And see Daniel *v.* Mayor, &c., 11 Humph R., 582.
Halstead *v.* The Mayor, &c., of New York, 3 New York (3 Comst.) 430, 431.
Ransom *v.* The Mayor, &c., 24 Barbour, S. C., R., 226.

[4.]

AS TO THE CLAIM FOR DAMAGES FOR THE FAILURE OF THE CITY TO PROVIDE A SINKING FUND TO PAY THE PRINCIPAL AND INTEREST OF THE PAVING BONDS.

It will be noticed that the ordinance under which the paving bonds were issued, already copied in the statement of the case and to be found in the printed record, pages 110—111, provided for the appointment of a board of three trustees, to be called the "Bond Trustees," to whom the City Treasurer was to pay over weekly one-sixth of his receipts from revenue, beginning on the second Tuesday in January, 1868. The "Bond Trustees" were to pay the interest on the bonds as it became due, and to invest the balance in the bonds themselves at their market value, and to return the bonds and coupons retired to the City Comptroller, who should cancel them.

The provision in the "bond contracts" is that the paving was to be paid for in "paving bonds, payable in 5, 10, and 15 years, in equal proportions, with six per cent. coupons attached payable semi-annually, principal and interest guarantied and provided for by a sinking fund set aside for that purpose."

Printed record, pp. 88, 91.

It will be observed that the ordinance and the part of the contract just quoted substantially undertake the duty expressly enjoined by the charter upon the Board of Mayor and Aldermen in reference to providing for the payment of the interest and for the accumulation of a sinking fund to redeem the bonds.

The part of the charter referred to has already been copied, and see it in Memphis Ordinances for 1867, page 222.

It is apparent that the failure to provide for the payment of the interest on the paving bonds, and for the sinking fund to redeem them, resulted from a disregard by the city's legislature and officers of public duties specifically enjoined upon them both by the law of the State and an ordinance of the city.

It is not necessary to go to the extent of arguing that the city could not, *in any case*, be held liable for damages resulting from such defaults.

See the principle of exemption from liability in somewhat similar cases discussed, and the cases cited in Dillon's Municipal Corporations, S ec. 772—777.

(a.)

CITY'S OFFICERS OUGHT TO HAVE COMPELLED BY MANDAMUS TO PROVIDE THE SINKING FUND, AND CITY NOT LIABLE TO DAMAGES FOR THEIR FAILURE.

I contend that the city is not liable for the damages that may have accrued, because the duty of providing for the payment of the interest on the paving bonds, and for the ultimate redemption of them, under the charter and and the ordinance, was purely a ministerial duty, and was capable of being enforced, and ought to have been enforced by mandamus against the Board of Mayor and Aldermen and the other officers.

See Knox County v. Aspinwall, 24 Howard, 376, and the numerous cases that have followed it.

Dillon on Municipal Corporations, Sec. 685.

It is hardly necessary to observe that the mandamus is awarded merely because the law gives no other remedy against

the corporation, and that the fact that it lies against the officers of a corporation to compel the corporation through them to perform a specific duty, is strong, if not conclusive evidence, that there is, in the particular case, no other remedy against the corporation.

This Court has gone so far as to hold that a personal action may be maintained against an officer of a municipal corporation, who, without sufficient legal excuse, neglects or refuses to do a ministerial act which the law absolutely requires him to do in his official capacity; as for instance, to levy a tax sufficient to pay a judgment.

Amy v. The Supervisors, 11 Wallace R., p. 136.

This case, I submit, proceeds upon the theory that the wrongful act of the officer is personal merely, and not official or corporate; and hence, while the corporation whose representative he is, may be operated upon in an appropriate proceeding directly through him, and compelled to perform specifically the neglected act, yet he only, and not the corporation, is liable for the damages he wrongfully occasions by his neglect or refusal.

And see Johnson v. Philadelphia, 47 Penna. St. R., p. 382
McCullough v. The Mayor &c. of Brooklyn, 28 Wendell R., * p. 458.

(*b.*)

THE REMEDY BY MANDAMUS TO COMPEL THE PROVIDING OF THE SINKING FUND PASSED FROM T. E. BROWN & CO. WHEN THEY NEGOTIATED THE BONDS, AND NOW BELONGS TO THE HOLDERS OF BONDS.

Not only was the remedy by mandamus the appropriate remedy of T. E. Brown & Co., while they held the bonds, to compel the provision for the payment of the interest and the redemption of the bonds, but it was a remedy that has, as an incident, passed along with the bonds and coupons to every subsequent holder. It is a familiar principle applicable to all negotiable instruments, that upon negotiation they carry with

them as incidents all the securities annexed to them, and all the remedies necessary to enforce them.

The cases in this Court, which have decided that the holder of negotiable bonds or coupons, though not the payee, is entitled to a mandamus to compel the levy of a tax to pay the judgment rendered on the bonds or coupons, proceed upon this principle.

See Knox County v. Aspinwall, 24 Howard 376, and the subsequent cases.

English *v.* Supervisors of Sacramento, 19 California Reps., p. 172, is a case more directly in point. An act authorized the issuance of bonds payable in ten years, and made it the duty of the county authorities to assess annually, in addition to the other taxes, a tax as a sinking fund for the gradual redemption of the bonds. The county authorities refused to levy the tax. An indorsee of one of the bonds filed a petition for a mandamus to compel the levy of the tax, and the court awarded him the writ.

The record discloses the fact that T. E. Brown & Co. are not the holders of any of the bonds.

Printed record, p. 355.

Now each holder of a coupon or bond has a right to demand the provision for the payment of the interest, or the redemption of the bond, according to the terms of the charter, the ordinance, and the paving contracts.

And the result is, that if T. E. Brown & Co. have an action to recover damages for the failure of the city to provide for the payment of the interest and the redemption of the bonds, the city is in the attitude of paying damages for the breach of the contract, while, at the same time, it may be compelled specifically to perform the contract.

I contend, therefore, that when T. E. Brown & Co. disposed of the bonds, they also disposed of any right they had to demand the provision for the payment of the interest on the bonds, or the redemption of the bonds, and also the right to sue for damages, if any existed, for the past failure of the city

to make the provision, and that whatever rights they had in that respect before they parted with the bonds, either ceased to exist when they disposed of them, or vested in the party to whom they transferred them.

(c)

THE ACCEPTANCE OF THE BONDS BY T. E. BROWN & CO. WAIVED ANY CLAIM FOR DAMAGES BECAUSE THEY WERE NOTSUCH AS THE CITY CONTRACTED THEY SHOULD BE.

T. E. Brown & Co. might have refused to receive the bonds in payment for their work, if they considered the failure to provide for the payment of the interest and the redemption of the bonds a material breach of the city's contracts.

But, knowing that the provision had not been made for the payment of the interest and the redemption of the bonds, they chose to receive the bonds under their contracts, without objection or protest, and gave receipts accordingly, and they never at any time demanded of the Board of Mayor and Aldermen that they make, or suggested the propriety of their making, the provision for the payment of the interest or the redemption of the bonds.

Not only so, but they negotiated every bond and coupon in the market, and they are outstanding still, and to be paid in full, if the city has not redeemed or paid them, as T. E. Brown & Co. have never returned, or offered to return any of them.

Now it seems to me that the rule which precludes a vendee from denying that an article delivered him is a compliance with the contract of sale, where he has accepted it, after a fair opportunity to examine it, possessing at the time the information necessary to enable him to determine its qualities, applies here, and estops T. E. Brown & Co. from asserting a claim against the city for damages resulting from the bonds delivered them being different from those contracted to be delivered, especially after they have put the city in the position of being obliged to pay every bond and coupon they received.

Swain v. Seamens, 9 Wallace, 254, 274, shows an application of the rule. And see McCormick v. Satson, 45 New York R., p. 265.

But whether the above proposition is true or not, when T. E. Brown & Co. accepted the bonds paid them, they substantially agreed with the city that its pre-existing liability to them was merged in the bonds, and that their remedy for what the city owed them, should be upon the bonds, and their recoveries, of course, according to the tenor and effect of the bonds.

There can be no doubt that the city's liability upon the bonds is perfect, and that it is legally bound, and will have ultimately to discharge them by paying the full amount of principal and interest called for by them to the holders.

If the city was an individual, and T. E. Brown & Co., under a contract similar to the contracts involved here, had accepted the negotiable paper of such individual, for the work done by them, and disposed of the negotiable paper at a discount, it would not be claimed that they could recover of the individual the difference between the price they sold the paper for, or its market value, and the face of the paper.

But it is contended that the fact that the city's bond are public securities, circulating from hand to hand by mere delivery, and having a recognized market value, places them on a footing different from the negotiable paper of a private individual; and hence, that the city delivered them, and T. E. Brown & Co. accepted them, and had a right to accept them, not with a view of retaining and collecting them, according to their purport, but with the object of putting them immediately upon the market, and selling them for the best price they would bring, and thereby realizing that price, instead of the bonds themselves, as the compensation for their work under the contracts; and, as the city, by failing to provide for the payment of the interest and the redemption of the bonds, rendered them less valuable in the market than they would have been had the city complied with its contract, it ought to make good to them the loss.

In the first place, as appears in the statement of the case, it was expressly stipulated in the contracts that the bonds were

to be taken at par, and was distinctly understood, before the contracts were entered into, that none of the bonds were to be placed in the market for sale or offered for sale, but they were to be held by the contractors.

Printed record, pp. 113—114.

In the next place, I deny that as between the immediate parties, and before the bond is put in circulation, there is any difference between the note of an individual and the bond of the city, when it is accepted by a creditor for a debt, or as evidence of a debt due him, and is sold for less than it calls for.

Coddington v. Gilbert, 17 New York R., p. 489.

In either case the creditor must suffer the loss himself, and he cannot impose it upon the debtor by recovering damages for the difference between the price realized and that which ought to have been realized.

See the authorities cited on the question, whether T. E. Brown & Co. are entitled to a credit for the discount or loss on the bonds and scrip.

After the bond of the city is once in the market, and its negotiable quality has attached, it may be that even between the city and the party to whom the bond was delivered, a case might arise in which the bond would not be treated as the negotiable paper of an individual.

But the present is not such a case.

(*d*)

THE DAMAGES CLAIMED NOT IN THEIR NATURE CAPABLE OF LEGAL COMPUTATION, BUT UNCERTAIN, AND PURELY SPECULATIVE.

Waiving the discussion of the questions whether the claim of Forrest, Mitchell & Co. for damages for the failure to provide for the payment of the interest on, and the redemption of the bonds received by them, was assignable, and whether the modification of the bond contracts on the 15th October, 1867, by the agreement between the city and Taylor, McBean & Baldwin, without a reservation of their claim for damages on the bonds delivered before that date, was a waiver of the claim,

I contend that as T. E. Brown & Co. knew, before May 8, 1868, when (printed record, pp. 312—313), they became the assignees of the bond contracts, that no provision had been made by the city up to that time for the payment of the interest, or the redemption of the bonds, and as the paving bonds, and all the other bonds of the city, had at that time an established market value (printed record, page 341), and that market value was not diminished by anything the city did, or failed to do (printed record, pages 352, 405), T. E. Brown & Co. have no just claim against the city for damages.

They have not lost anything that they had a reasonable ground to expect. Indeed, they virtually admit they have lost nothing at all, as their claim is, that the failure of the city to provide for the payment of the interest and the redemption of the bonds, prevented the paving bonds rising in price in the market above other bonds, and not that the failure caused the bonds to depreciate below the market price of other bonds.

Now, I submit that the damages claimed are, and in their very nature must necessarily be, purely speculative. They are not capable of definite ascertainment, nor is there any standard by which they can be even approximately fixed. The witnesses who testified on the subject ventured suppositions not based upon a knowledge of the values of bonds similar to those they were asked about, for none such ever existed, but based solely upon opinions as to what the value of such bonds would be were they in the market.

When it is remembered how much the value of municipal bonds depends upon the location, wealth and character of the corporation issuing them, and how the bonds of corporations apparently equally good vary in value, and how the values of all bonds are affected by the state of the money market, and a thousand other circumstances, and how the bonds of the same corporation, without any apparent sufficient cause, suddenly rise or fall in price, the unreliable character of the basis on which the witnesses were forced to found their opinions sufficiently appears.

Indeed, no better argument can be made against the allowance of the damages claimed on the ground that they are

speculative, than the mere reading of the testimony taken to prove the amount of them.

See it in the printed record, as referred to in the statement of the case.

I will give but one example of its character. The sinking fund provided for by the ordinance under which the paving bonds were issued, was to be created by the City Treasurer paying over weekly to the "Bond Trustees" one-sixth of his receipts from the revenue, beginning on the second Tuesday in January, 1868.

Printed record, pp. 110—111.

Now, no single witness was asked what would have been the value of the paving bonds if the City Treasurer had paid over to the "Bond Trustees" weekly one-sixth of his receipts from the revenue, as provided in the ordinance.

But the question was substantially—"what, in your opinion, would bonds of Memphis, running five, ten and fifteen years, in equal proportions, with six per cent. coupons attached, payable semi-annually, principal and interest provided for by a sinking fund set aside for that purpose, have been worth?"

Printed record, p. 176, and other pages referred to in the statement of the case.

It is hardly necessary to say that the question did not direct the attention of the witnesses to the sinking fund that the city ought to have provided, sufficiently to enable them to give intelligent answers as to the probable effect of it, *had it been provided*, upon the value of the bonds.

(c)

THE PARTIES CONTRACTED WITH REFERENCE TO THE DEPRECIATION OF THE BONDS, AND THE COURT CANNOT ALLOW DAMAGES BECAUSE IT HAPPENS THAT THE DEPRECIATION WAS GREATER THAN WAS EXPECTED.

After the paving bonds due Forrest, Mitchell & Co. for paving done by them had been delivered them, and they had a known market value (printed record, p. 341), the modification of the

"bond contracts" so as to make the work done under them in front of private property payable in money, instead of the paving bonds, was made.

Printed record, pp. 34–35.

As already shown in the statement of the case, the prices to be paid in cash were much less than the prices to be paid in bonds. In other words, the parties recognized and contracted with reference to the fact that the bonds were largely depreciated.

For instance, while $5.75 in bonds was to be paid by the "bond contracts" for a square yard of paving on Main street, only $3.95 in cash was to be paid after the modification.

Printed record, pp. 34—35, 113.

Now, as the parties have *contracted* with reference to the depreciation of the bonds, is it admissible to allow damages to T. E. Brown & Co. because the depreciation of the bonds has been greater than they probably expected, or had a right to expect, if the city had strictly complied with its contract?

(*f*)

IF DAMAGES ARE TO BE ALLOWED AT ALL, THE SUM ALLOWED IS TOO LARGE.

But suppose damages are to be allowed, the Master erred in estimating the amount of them.

He shows that the aggregate amount of paving done under the bond contracts before the 15th October, 1867, was $155,962 15
And after that date..... 165,298 30

Making a total of..... $321,260 43
paid for by the city in bonds.

The Master says he estimated the damages of T. E. Brown & Co. at a little less than forty cents on the dollar.

Printed record, p. 346.

He puts the total amount of the damages at $115,216.00 (printed record, p. 348), which is a little less than forty cents on the dollar of $321,260.43. And so I conclude he takes that

sum as a basis for his calculation, and fixes the value of the paving bonds, had the city provided for the payment of the interest and the redemption of the bonds, as it contracted to do, at about ninety cents on the dollar.

Taking Main street for example, the difference of the cost of a yard of paving in bonds and in cash, by the contract of the parties, was..... $1 80
The price per yard being in bonds..... 5 75
And in cash..... 3 95

An exact calculation will show that in this way the parties estimated the bonds to be worth not quite sixty-eight and two-third cents on the dollar, instead of ninety, as the Master reports.

A calculation as to the prices for the other streets will show about the same result.

Thus, by the Master's report, the city is made to pay as damages for not providing for the payment of the interest and the redemption of the bonds above twenty-one cents on the dollar more than the bonds were estimated to be worth by the parties in the identical contracts on which the suit is based, making an aggregate of above $67,464.79.

And, as finally fixed by the decree, the amount allowed is $42,056.79 more than it ought to be.

The testimony taken on behalf of the city tends to fix the price of the bonds, with an adequate sinking fund, at about the same as that placed upon them by the parties in their contracts, as shown above.

See testimony of Cossitt, Kirtland, Freeman, Murphy, Farrington, Levy and Garth, printed record, pp. 391–401.

Respectfully,

WM. M. RANDOLPH,
Of Counsel for City of Memphis.

In the Circuit Court of the United States,

DISTRICT OF WEST TENNESSEE.

THE CITY OF MEMPHIS,

—VS.—

T. E. BROWN.

BILL AND CROSS BILL IN EQUITY.

OPINION OF JUDGE EMMONS

ON THE

Powers and Liabilities of Municipal Corporations.

MEMPHIS, TENN.:
PUBLISHED AT THE FRANKLIN JOB PRINTING HOUSE.
1872.

OPINION.

The City of Memphis vs. T. E. Brown.

T. E. Brown vs. The City of Memphis.

BILL AND CROSS-BILL, IN EQUITY.

HEAD NOTES.

When contracts have been made, acts done, and labor performed in pursuance of a construction of a city charter, acquiesced in by all its citizens competent by such an interpretation, it will be sustained if justified by any possible reading of the statutes.

In reference to all acts which a Municipal Corporation has power in any mode, and by any agency, to perform, it may bind itself by those agents whom it suffers to act for it, and in the modes which it sanctions by its own usages.

Where the charter prescribes votes of shareholders, citizens or directors, or other formalities as conditions precedent to the performance of acts, and such acts are performed without such formalities, third persons acting in good faith may presume all has been done which the charter demanded, and the corporation will not be suffered to prove its own negligence or wilful dereliction to defraud innocent parties of their labor, property or money.

A municipal, like a private corporation, may in the ordinary course of its government, and in the conduct of improvements it is its duty to execute, make promissory notes, bonds, guarantys, and all other agreements necessary or convenient for the economical and proper financial management of its affairs as fully as a natural person.

The Mayor, City Attorney and Treasurer of the Corporation having ordinarily been suffered to make similar agreements, may engage attorneys to collect demands due the municipality, when its interests demand such service.

If the service is in a suit in which the City is a party, or in which it is interested, and they are performed with the knowledge of the Officials, it is liable for the services in the

same manner as a natural person. Judgments holding the contrary depend upon statutes which expressly prohibit such retainers.

A guaranty of payment imposes an obligation to pay at the maturity of the security, and the holder need not wait the result of a suit against the principal debtor, but may demand the money from the guarantor immediately upon the dishonor of the paper.

The payment of a less sum is not a sufficient consideration for an agreement to discharge a greater, but the Code of Tennessee alters the common law rule, and enforces such contracts when in good faith fully performed according to the intention of the parties.

When an agreement is made by a debtor to deliver in full satisfaction of a large sum due, his notes or money for a less sum, even though there is a consideration for the agreement, it must, in order to operate as a discharge, be fully and fairly performed in all its parts, both in time and amount.

Equity will not enforce the performance of unfair or hard or unreasonable contracts.

In order to sustain a contract of settlement without other sufficient consideration, upon the ground that it was the compromise of *doubtful claims*, the doubt must be such as would arise in the mind of an ordinarily intelligent person familiar with the class of things which is the subject of the settlement.

The measure of damages for the non-payment of money, or the non-delivery of a debtor's obligations for money, is the amount due and interest, and as an almost universal rule, no collateral damages can be given.

If negotiable bonds, of a class which by the usages of trade, are vendable in market at established rates, are to be issued in payment, accompanied with a sinking fund to give them greater market value, such bonds are to be treated as if they were chattels and things *in esse*, and the damages for failure to provide the fund will be the difference between the value of the bonds as they were agreed to be made, and the value as they were in fact made.

Judge EMMONS said he made more than ordinary efforts in this cause, considering it one of unusual importance, to prepare a written opinion. The pressure of judicial business upon him was well known to his brethren, and he was sure they would readily believe the omissions had resulted from no want of effort on his part.

From still more voluminous memoranda than those before him, he had, on several occasions and unfortunately somewhat separated in time as he could command opportunity, dictated to an amenuensis what his ill-health had prevented his writing. The result was, that from the novelty to him of such mode of labor and the absence of continuous application to it, what had been prepared was fragmentary, contained many unnecessary repetitions and was of far greater length than requisite to discuss amply all the questions dealt with. He could therefore do no more than use what was thus prepared as notes for an oral opinion.

He hopes soon, from his more extensive citations, to prepare a written opinion for the law journals. It will, it is believed, be written within much shorter compass although it may add somewhat to the reasons for the judgment rendered.

We have taken the liberty to indicate the different subjects discussed by headings for the greater convenience of the reader. They are not parts of the opinion and may not in every instance with accuracy describe what the Judge discusses and decides. His Honor then delivered the following judgment which we are authorized to say is substantially although not in all cases literally what was said.

The interest of parties demanding it, and as other causes are pending resting upon principles decided in this, his honor, after much hesitation, yields to the request for its publication in this form now.

STATEMENT.

Suit at law was originally brought by Brown & Co. in this Court for paving; subsequently the City filed its bill in equity against Brown & Co. in the State Court, on the same contracts, to restrain certain collections by Brown & Co., and for an accounting. This suit the Defendants removed to this Court, and by consent of parties the subject of the action at law was by cross-bill united with this suit.

The action is based upon two contracts made by the City with the assignors of Brown & Co., for street paving. Under the first, paving at the intersections of streets and alleys and opposite public ground, was to be paid for in cash by the City, and that opposite lots of private owners, by such owners, on bills to be made out by the City Engineer, one-half when each section of 400 feet was done, and the other half, in installments, due in thirty, sixty and ninety days, the payment of which the City guaranteed. Under the second contract, the whole work was payable by the City, as each such section was done, in 6 per cent. coupon City bonds, running five, ten and fifteen years, guaranteed by a sinking fund.

After some work had been done, this second contract was modified so as to make the work opposite private lots payable in cash as under the first.

After most of the work was done, when over half a million dollars were due, the City agreed to loan Brown & Co., first $100,000, and afterwards $175,000 of its bonds, upon an agreement to secure them by pledges, and to return them with interest in eighteen months, and also to release the City from all liability on the contracts unless it should be determined by the Court of last resort that the lot owners were not liable. Some forty thousand dollars of the bonds under this loan agreement were not delivered.

The other facts will sufficiently prove this opinion.

POWER.—The City of Memphis has authority to pave its Streets, either by assessment upon adjoining lot-owners, or by general taxation. It may, for the same improvement, adopt both modes partially.

It is objected that the contracts are both void for want of power in the City to assume liability for the work.

The claim is that the lot owners in all cases, no matter howsoever burdensome or unjust it may be in the instance, are to be assessed the entire cost, and that the corporation can improve its streets in no other mode.

We think so impolitic and unjust a construction is not even plausibly sustained. If it be granted as the counsel for the City contend, that the sole authority for these proceedings is under the act of 1866, we think they are clearly warranted by that law.

That statute (Bridges' Digest. p. 140.) provides that the corporation shall have "complete control over the streets and squares of the City," and "*power* to *require* that the costs of paving, etc., shall be bourne by the owners of the adjoining property etc." It by no means enacts that it shall in all cases do so. The expenses, if so *required* in the exercise of this *power*, shall be charged by the City to the owners and paid to *it* by them. The work is to be done under the Engineer of the City, and is by *it* to be let to the lowest bidder. When the bid is accepted by the City authorities, the *contract* is to be made by *it* and *not* the owners, and when so made, it is the duty of the City to perform the political function of assessing the expense *pro rata* upon the owners. These municipal assessments are to be collected by the *City Attorney*, and, presumably in the absence of all contrary provisions, paid over, when collected, into the City treasury.

Thus far the provisions are all appropriate to exercise the power of requiring this special assessment, or omitting it in whole or in part, as in the judgment of the administration shall seem just. It has no tendency to suggest the idea of an inhibition upon the City to assume liabilities under its own contracts and for its own specially authorized corporate action. In former laws there are, in special cases, *limitations* upon the power of general assessment, but so far from these provisions favoring the construction claimed their insertion then, and their absence now are most persuasive in the other direction. It is irrational to say that this act shall include by implication a prohibition inserted in other laws, but consistently omitted in this one.

The nature of the duty, too, it would seem, demands the interpretation asked by the contractors. Improvements requiring extraordinary grading and expense, which are highly beneficial to

the City at large, are often injurious to the abutting lots, rendering them unfit for the only purposes of their present use. In such cases it is alike politic and just that the assessment in whole or in part, should be general. We think the law intended to secure this necessary power and authorized the City to assume the responsibility, totally or partially, of paying for the work it officially orders. *It* must make the contract as well as the assessment. This act of assessment, unless it is anomalous, creates an obligation to the municipality making it, and not to strangers. The *Corporation*, not contractors, are to collect it, and it seems to us had there been any intention to preclude the liability of the City upon a contract it is authorized to make, some express inhibition would have been inserted. Those who procured, and in the outset construed the act, did not suppose it contained any such inhibition.

The chief reliance for this exception is upon the clause which provides that the owners when so assessed "shall be bound as upon liabilities contracted by themselves." This is no negation of the liability of the City upon a paving contract made under express authority contained in the same section. That it might be convenient financially, and as a matter of popular management for the City to do as it has done in this instance—treat these paving bills as private obligations of the lot owners, transferable in its hands like obligations contracted by the lot owners—was foreseen by the officials who procured this amendment, and this power was inserted in the law. When the assessment is complete, and the bills made out by the City Engineer, they may be treated by the City, sold, pledged or transferred, with or without guaranty like the notes or obligations of the land owners. The legal liability created by the ordinary assessment of a tax, without this provision could not be thus transferred. This is all we think that clause was intended to effect. This is the practical construction given their own power, by the officers and agents of the City. The rule is well settled, as it is fair and honest, that when parties have acted in good faith upon a given interpretation of a charter, and the party who has received a benefit under it attempts to escape just responsibility by denying the authority, the Court will, if possible, sustain the interpretation they both have given to it. Were it necessary, as we do not think it is, to invoke any such rule, the following cases which

sustain it, are quite beyond the requirements of the case now before the Court: 3 Wallace, Jr., Woodbridge vs. Beaver County; 5 Mich. 467, Davenport vs. Wisener; Tallcott vs. Township of Pine Grove, Western District of Michigan, 1872; 1 Wall., 391, Mayor vs. Muscatine; do., 297 Van Horstrap vs. Madison City, where, speaking of the power to issue bonds, the Court says: "Even if the "case had been doubtful, inasmuch as the City authorites have "given this construction to the charter and bonds have been issued, "and in the hands of *bona fide* purchasers for value, we should "have felt bound to acquiesce in it." A similar law in 5 Bush., 514, (Ky.,) City of Louisville vs. Henderson, was held to impose the duty solely on the City, and that a stipulation that the owners should be alone liable was void. We do not so hold here, as this has been but slightly considered. It is quite clear nevertheless, that the City is, and should be the contracting party, as upon all principles of correct political administration it should be the sole actor officially to make and collect the assessment, and as suitor judicially to enforce the duty of payment from the lot owners.

Some judgments have been cited where cities were expressly and plainly forbidden to assume such liability. They have no application here where there is no such inhibition. The charters are wholly unlike. But even in those cases the Courts rule most stringently, that if the duty of assessment and collections is imposed upon the municipality for the benefit of the contractor, as it is conceded to be in this case, that duty must be performed in the shortest period possible. If it is neglected, it becomes under such statutes, liable for the risk. It cannot shield itself under dilatory proceedings.

This, however, like the other rule, is unnecessary here, and is referred to only in illustration of how the policy of these exemptions strikes our most enlightened tribunals.

It is well, however, to say that we by no means think the act of 1866 a repeal, by implication, of antecedent powers. In some respects it is expressly in *addition* to former ones, and nowhere is there an implication that its prescriptions are exclusive. From the first incorporation of the City to the last amendment in 1866, there were repeated enactments which under familiar canons of construction, would authorize these proceedings. They unnecessarily

contain, for abundant caution the authority to exercise, in the execution of these duties, all the powers which *natural persons* might have under the same circumstances, and every contract, loan, guaranty, pledge and act necessary or appropriate for the best accomplishment of the general object may be performed by the City.

It may do these acts through such agents as it has accredited by ordinance, or where the charter does not forbid, by all such, as it has held out to the public as competent and whom it has suffered to perform them. It is upon common law principles, irrespective of these special clauses in the charter, bound by all acts and agreements of its Mayor, City Attorney, Treasurer, and other officers and agents, whom it has ordinarily entrusted with such duties.

AGENTS.—The City is bound by the acts of those whom it suffers to act as its Agents, and by the modes of action it has sanctioned by usage.

A distinct consideration cannot be given to the manifold objections made by the counsel for the City in reference to the power of the Mayor, the Treasurer, the City Attorney and other officials to perform various acts during the progress of this work.

That the Mayor and other officers could not make the agreements to take the bonds below par, that they could not under the contract order the work suspended, could not authorize the retention of counsel to aid the City Attorney in duties for the benefit of the corporation without a vote of the Council, and various similar objections were elaborately urged.

Deeming every one of them to refer to powers which the City had in *some* form and in some mode, full right to exercise, and being referred to no express statutory prohibition, forbidding the performance in the manner which is shown to be usual in its administration of this whole class of duties, we consider them all answered by the familiar doctrine that corporations like individuals are bound by acts of those whom they have suffered to act as their agents and by such modes of action with or without vote as they have by common usage sanctioned as proper. We repeat, after careful reconsideration, the doctrines in this regard contained in Ray vs. Nashville, in the Middle District of Tennessee, 1871.

We had in that case the benefit of a most careful and learned

argument. The securities of the City had been, in violation of its ordinances, put upon the market much below their par value. The Court after explaining to the jury the distinction between acts and contracts which were not authorized at all by the charter, and those which were so authorized but required the performance of official acts in order to render them regular, said that the latter, even though made or performed without the formalities demanded by the statute, bound the corporation as to all parties not having actual notice of the irregularity. That this principle was applicable alike to negotiable securities, to municipal as well as to private corporations. Among other charges the following was given:

"It is in evidence that by usage such instruments have been "signed and issued by the officers who issued these. If you credit "this evidence, it is sufficient to authorize you to find that the "Mayor, Recorder and Treasurer were agents of the corporation for "this purpose, and competent to bind it by these instruments. A cor- "poration, unless restricted as to manner by its charter, may, by "holding out to the public, officers as clothed with certain powers, "be bound by their acts within the scope of the functions so "usually exercised."

This, it was said, was at least the law of the National Courts, and most clearly that of Tennessee. In the same case we excluded offered evidence of irregularities in the issue of the securities sued on. The Court in that case relied upon the following Federal judgments: 21 Howard, 539, Commissioners of Knox Co. vs. Aspinwall; 23 How., 381, Zabriski vs. Cleveland R. R. Co.; 24 How., 289, Bissell vs. Jeffersonville; 3 Wallace, 634, Rogers vs. Burlington; 1 Wall., 221; 1 Wall., 291, Vanharstrop vs. Madison; 1 Wall., 83, Mercer Co. vs. Hackett; 1 Wall., 383, Meyer vs. Muscatine; 5 Wallace, 772, Supervisors vs. Schenck; 2 Black, 722, Mann vs. Miami Co.; 7 Wall., 413, R. R. Co. vs. Howard; 9 Wallace, 414, Mayor, etc., vs. Lord. A great number of State adjudications were also cited and discussed by counsel in the case, which it is unnecessary to cite here in view of the pointed character of the National and local State judgments in Tennessee. A small number from the extensive list are referred to, only to illustrate the principle we consider firmly embodied in the American Common Law. It is not peculiar to the Federal Courts or

those of Tennessee. The citations of course might be greatly multiplied. They are collected by Messrs. Angell & Ames, by Mr. Redfield and other writers upon this subject, to the propositions they deem long settled, and no longer questionable. Hermann on "Estoppel, 512: Corporations are bound by estoppel in pais like "natural persons." Trustees vs. Mayor, etc., Aberdeen, 13 S. & M., 647, 5 Wallace, 772. The Court says, (p. 782,): "Excess of "power may be ratified by express act or impliedly by assent, by "acts and conduct inconsistent with any other hypothesis."

U. S. Bank vs. Danbridge, 12 Wheat, 70. Where the law required the bond of the cashier to be approved by the Board of Directors, it was said practical adoption by action which presumed it, was sufficient. Gas Co. vs. San Francisco, 9 Cal., 469. The City officers had lighted the City buildings with gas without any contract of the Common Council. The Gas Co. sued for the value of the gas so consumed during several years. Field, J., says: "The City is bound by its acts and conduct as an individual or "private corporation. It is impliedly bound and liable whenever "justice demands it to be."

Peterson vs. Mayor, etc., of New York, 17 N. Y., 453. The suit was for plans for market made at the request of a committee, although the contract of employment was void, the City was held liable on a ratification by the use of the plans.

The Court, by Denio J., says: "This ratification may be by acts "or conduct inconsistent with any other supposition than that it "intended to own and adopt the acts done in its name." Quoting, "Kent J., says: The doctrine that corporations can be bound by "implied contracts to be deduced from corporate acts without either "a deed in writing or vote is generally established in this country "with great clearness and solidity of argument," and quotes many cases.

See also Meyers vs. City of Muscatine, 1 Wall., 393; Gilpke vs. City of Dubuque, 1 Wall., 175; Allegheny City vs. McClarken, 14 Pa. St., 83; Dougherty vs. Hunter, 54 Penn. St., 381.

In Ardisco Oil Co. vs. Gibson, 63 Penn. St., 150, a suit for damages from the explosion of an oil refiner, built under the direction of the President of the Company, without any special authority from the Company, the Court says: "It is their officers

"having charge of their business, who, for all practical purposes, "must be regarded as the corporation itself. The same rule of "liability must be applied to them as to natural persons." See also, 45 Mo., 419, Bank vs. Gilstrup. That where there is power in reference to the subject generally, the City may make all the contracts and do all the acts an individual may do, see also, 48 Ill., 423, Corwith vs. City of Galena; 50 Ill., 154, People vs. City of Cairo; 11 Wis., 349, Blunt vs. Walker; 18 Gratton, 338 De Voss vs. City of Richmond; 9 Cal., 469, Gas Co. vs. City of San Francisco; 13 S. & M., 647, Trustees, etc., vs. Mayor of Aberdeen, 5 N. Y. (1 Seld.), 374, 12 Wheat. 61.

The following decisions in this State so fully sustain what has been already said, that all reference to general discussions elsewhere than in Tennessee and the Federal Courts, might well have been omitted. It quite covers all the objections made by the learned counsel for the Complainant. 2 Coldwell, 645, Adams vs. the City of Memphis, puts at rest all the objections in this case in reference to the want of authority to guarantee, to issue bonds generally, to agree to pay counsel for the collection of the paving bills, to sell bonds below par, and all other subordinate acts in this case germain to, and proper for, the execution of the main duty of contracting and paying for the paving of its streets. In that case the City guaranteed the bonds of the Little Rock R. R. Co. and to secure them, mortgaged a tract of land donated to it by the United States. The charter contained no special provision authorizing this action. The Supreme Court of Tennessee deduced the right to make the mortgage and the instrument of guaranty solely from the general implied power of the corporation. On page 660, they quote 21 How. 424, including its citations of State judgments as follows: "It is "well settled that a corporation without authority in the course of "its ordinary business may make bonds, notes, mortgages and drafts, "except when restrained by law. 25 Barb., 146, 1 Sand., ch. 280, "14 Barbour, 358; 5 Watts & S., 223; 4 Robb, 517; 4 B. Mon., "423; 6 Gill & J., 328; 32 N. H., 486."

The citation of this clause, including these judgments, and the comments accompanying them, render it clear that the law of Tennessee fully authorizes the City of Memphis not only to issue negotiable securities, but to make the guaranty in question. This

judgment is equally conclusive that in this State the non-performance of conditions by a corporation necessary to render its action regular, will not affect parties who are not cognizant of the irregularity. On page 661, and onward, 21 How, 381, Zabriski vs. R. R. Co., is approvingly cited as follows: "Corporations cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced." This language is frequently used by the U. S. Supreme Court. 24 How, 300; 3 Wall., 667, etc. They also cite and approve 1 Wall., 93, Mercer County vs. Hackett; 21 How, 548, Knox Co. vs. Aspinwall; do 365, Avery vs. Allegheny City; 1 Wall., 291, Van Horstrop vs. Madison City. Although the case before the Court was that of a municipal corporation, the rule was applied that it was estopped from setting up its own irregularities to defeat its apparently formal obligations with the same vigor as if it were a private company. All the cases referred to in support of the doctrine, except Zabriski vs. R. R. Co., are also those of Municipal Corporations. Towns, Counties and Cities and Railroad Companies, are all by the judgments of this State, put upon the same footing.

That the City had power to make these contracts, including the guaranty for the prompt payment of the work it ordered, to issue the bonds, covenant for a sinking fund, and incur responsibility for all ordinary damages for a violation of its contracts, we have no doubt.

GUARANTY.—The City had power to make the guaranty and it was for the payment of the paving bills when due.

The objection that the City cannot contract in the form of a guaranty, is fully answered by the preceding discussion and citations. It was, however, made the object of an extended and separate consideration at the bar, and we add that it is distinctly and pointedly overruled in the following and many similar judgments; 7 Wall., 413, R. R. Co. vs. Howard, and 5 Philadelphia Rep., 512; Evans vs. R. R. Co., as well as in 2 Coldw., Adams vs. City of Memphis.

It is said also, that if there is power to make the two contracts, still the guaranty in the first, even if valid, is one, not for *payment*

at the maturity of the notes given for assessment, but only of the land owners' solvency and ultimate liability. The judgments upon this subject are unambiguous and uniform. No case has as yet been presented to a Court where similar language has not been held to create a present absolute liability upon the maturity and dishonor of the paper guaranteed. If there are in this case any peculiarities distinguishing it from these cases referred to, it is only in features which still more imperatively demand the application of the rule. In Evans vs. Pittsburgh R. R. Co., 5 Phil., 512, the Company guaranteed the bonds of a County; Grier, J., after overruling the point in rather caustic language in reference to the defendant's objection, that it had *no power* to make a guaranty, and remarking that it was only when corporations were called upon to *pay* their obligations that they were ever found conscientious in reference to its exercise, held that the guaranty, in words no stronger than those used by Memphis in this case, was one of *payment* at the maturity of the coupons for interest. Equally direct are 1 Wall., Jr., 149, Parker vs. Calverston; 20 Johns., 365, Allen vs. Rightmere; 7 Wall., 407, R. R. Co. vs. Howard; 23 How, 381, Zabriski vs. R. R., Co.; 1 Hill, 256, Luqueer vs. Prosser; 4 Hill, 420, do.; 3 Hill, 584, Manrow vs. Durham; 6 Hill, 641, Leggette vs. Raymond; 6 Conn, 315, Beckwith vs. Angell; 17 Johns., 326, Tighlman vs. Wheeler; 12 Mass., 13, Upham vs. Prince; 3 ditto, 274, Josslyn vs. Ames; 9 ditto, 314, White vs. Howland; 5 ditto, 358, Hunt vs. Adams. That such is the law of Tennessee, appears from 3 Yerg., 330, Taylor vs. Ross; 10 Humph., 37, Hunter vs. Dickinson. The words were, "I guarantee the payment of, etc.," substantially the same as those in the contracts before us. It was held that this created an obligation to pay the money at the maturity of the note guaranteed, without waiting the result of a suit against the maker or obligor.

The great number of concurring decisions on this subject has arisen from no contest in reference to the rule itself. Like many other familiar truisms, it has been frequently repeated and discussed in ascertaining whether particular instruments and facts came within it. The history of its administration renders free from all doubt its applicability to the guaranty of the City. It was liable immediately when the paving bills were not paid at maturity.

RELEASE.—The Contract to loan the bonds of the City to the Contractors did not release the guaranty because it was not fully performed.

It is claimed that the liability of the City under the guaranty, is released by the loan contract of November 20, 1868. The proof shows that at such date, the City, irrespective of all consequential damages, owed the contractors over half a million dollars, and that they were in great financial distress in consequence of the refusal of the City to comply with its contracts. Payment was urged and refused, and for the first and only time, so far as the Record shows, the City officials suggested that the guaranty was not one of *payment* as the paving bills matured, but only for the ultimate solvency of the land owners and the sufficiency of the lands to meet the assessment. No other source of doubt in reference to the City's liability was suggested. The corporation agreed to *loan* the contractors $175,000 of its bonds, for eighteen months, to be returned with all interest paid, "in consideration that the contractors *will* "place in the hands of the City Attorney, paving bills to the amount "of the face value of the bonds, and upon the further consideration "that they *will* release the City upon *all liabilities* upon said paving "contracts, unless it should be decided that the property holders "were not liable for the pavement."

This was in the form of a resolution, which, being embodied in a contract, was signed by the contractors. The City, after some injurious delay, substantially disappointing the just expectations of the contractors, delivered some $140,000 of bonds, leaving a balance of $35,000 which have never been received. This agreement is relied upon, by the City, as a release of the guaranty. It is set up in the pleadings as an accord and satisfaction and *full performance* on the part of the City averred.

It would be sufficient to dispose of this position upon technical grounds, that full performance having been *averred in the bill*, a different case cannot be made by the proof. That the allegations and the evidence must agree, is a familiar principle common to all tribunals. It is, however, the practice of this Court, in all cases where justice demands it, to permit amendments to suit the case made by the Record. The facts and the law applicable to this cause, however, would render such an amendment useless here.

Much discussion was had at the bar in reference to the doctrines of specific performance when contracts were hard and unconscionable, and it was claimed that this bill by the City was in the nature of a proceeding to specifically perform this executory contract, on the part of the contractors, to execute a release. The doctrines of the following books and cases, declaring that an unjust agreement will not be specifically enforced, are not doubted. They are well established in the Federal Courts: Story's Eq. Jur., §§ 736, 760, 767, 771; Sugden on Vend., *236; 3 Hay., 202, Hall vs. Ross; 9 Yerg., 298, Cocke vs. Evans; do., 283, Reed vs. Nooe; Meigs' Rep., 496, Rice vs. Rawlins, 5 Hump., 529, Triggs vs. Reed; 2 Johns. ch., 222; 3 Cow., 505, 5 Ves., 845; 9 Ves. 234.

Without having so carefully considered this case upon the facts that we would confidently place the decision upon this rule, which refuses relief where it is to render ill faith successful, and to do injustice to one who has been constrained into a hard and unconscionable contract by misfortune and distress caused by the party who seeks to enforce it, we nevertheless say there is much which would suggest the application of the rule if there were not other well settled general principles constituting a conclusive answer to the claim of release on the part of the City.

In all cases of releases by parol contract, composition with creditor, or compromises of unliquidated demands, where the consideration of the discharge of the debt is the payment of a less sum of money, the delivery of the property of less value or the performance of acts, they must be literally and exactly performed. This is the well settled doctrine in every Court in the Old Country and in this. There is no conflict anywhere, the only discussions have been in reference to distinctions, all of which extend and render still more stringent and difficult of administration in favor of debtors, this general doctrine. The cases cited by the complainant's counsel in reference to actions where the plaintiff has not fully performed, and is still suffered to recover what is in justice due, leaving a defendant to decrease the recovery or bring a cross action for the injury resulting from a partial performance, have not the slightest application. Were the City seeking to recover the $140,000 of bonds loaned to the contractors, and they should set up a defence so absurd as that they were not bound to

return them because they did not get all for which they contracted, then the long list of citations would properly answer such an objection. All this is fully conceded. If, on the contrary, the City itself relies upon a forfeiture, to which Courts have likened these contracts, and seeks to be relieved without any consideration, from the consequences of violating its own covenants, it must show at least a performance on its part of the agreement which it alleges has wrought such a consequence.

Irrespective of all equities pertaining to the condition of the contractors, or the nature of these instruments, the principles of law in all cases demand the most full and exact compliance with the contract relied upon by the debtor to defeat his creditor's claim. 2 Smith, L. C., 149, b., after stating that there were cases of compromises where several creditors united in a composition and where the action of one constituted a consideration for the action of others, so that a less sum would at law discharge a greater, says, even in these cases where the consideration is full, "the debtor will not be "entitled to the benefit of the agreement if he neglect to perform "accurately what is to be done on his part, he must tender the "composition money on the very day appointed; for, as Lord "Ellenborough said, in Crowley vs. Hillery, 1 M. & S., 120, the "party to be discharged is bound to do the act which is to discharge "him." See as to the same point, 5 B. & C., 378, Shipton vs Casson; 3 Dowl., 43, Wenham vs. Fowle; 16 M. & W., 181, Rushing vs. Muslin; 1 Excheq., 601, Evans vs. Powis. The author cites a long list of cases to the point that all these agreements must be executed. An examination of his citations, however, shows what other portions of the same note concedes, that where the agreement itself provides for the acceptance of one executory contract in satisfaction of another, it operates as such. And in this connection we add, that the proposed interpretation of this release, so as to make the contractors agree that they will release the City from a present obligation to pay half a million of dollars, for its *executory contract* to lend $175,000, is quite too irrational and motiveless to deserve much consideration. The release was to operate when the bonds were *actually loaned*, not when a resolution was passed that the City *would* loan them.

The discharge depended upon the *performance* of an *act* not upon

a *promise* to perform. The American editors of this book, 150–*a*, lay down as their second general proposition the following: "Every part of the matter agreed to be received in satisfaction "must be effectual, so that if a part fail or do not take effect, "the whole agreement is bad." The third one is, "The accord "must be executed, and a mere executory agreement can never be "pleaded as an accord and satisfaction." Again he says, "And if "part of the consideration agreed on be not paid, the whole accord "fails." At page 385, it is said, "It is not enough there is a clear agreement made upon a sufficient consideration, but it must be completely executed." At page 389, it is added, "That a mere agreement, unexecuted, to accept a smaller sum in discharge of a larger, is not valid, seems to be settled and is not contradicted by any American cases." 5 Wharton, 316, Rising vs. Patterson; 4 Watts, 126, Sprunebeger vs. Deather; 1 Zabr., 391, Daniels vs Hatch, and a very long list of American judgments is cited to the various propositions. In the 3 Iowa, 182, McCling vs. Lyster, a creditor agreed that if his debtor would pay a less sum at a time specified, the debt should be discharged. Part was paid, and a draft was given for the residue. It was claimed that the giving of a draft was a payment, as it is in this case, that the letters of the Mayor was substantially a delivery of the residue of the bonds, but it was held the thing to be done must be *executed*, and not a promise to do it merely. In 2 Iowa, 553, Fentrass vs. Merkell, it is also pointedly ruled that an accord must be fully executed, complete in all its parts. This doctrine is applied to a case where the agreement was to give a note, and although the giving of the note was but the giving of an evidence of a debt, yet they held that act must be performed. In 2 Wash., c. c. 180, Lattapee vs. Pecholier, the defendant agreed to pay a sum of money and also to deliver an endorsed note, in satisfaction of a debt. He tendered the money, but refused the note. Washington, J., held it was not a defence, first, because there was *no* consideration, and second, because it was not completely performed. He says: "What is it but an agreement to take $600, when $1600 is due? "Would equity enforce such a contract? Surely not." In 13 How, 346, Very vs. Levy, in deciding that an agreement to receive specific articles in payment of a debt, was binding in equity, and

where there had been part performance by the debtor, the rule is guarded by saying that if the goods had not been kept ready by the debtor and full compliance on his part shown, "the original bond would have remained in force and the right to the full amount of money due upon it." 16 How, 599, Early vs. Rogers, the Supreme Court says that where an agreement is made by a creditor to receive a less sum in discharge of his demand, although upon consideration, it cannot operate as a satisfaction unless the payment is made upón the day. And see 2 Nott & Hunt, 508, Rainsville vs. U. S.; Hempstead, 315, U. S. vs. Clark; 22 How, 270, Clark vs. Bowman. We have no hesitation in holding that this unperformed agreement for a loan on the part of the City does not, of itself, discharge it from its obligation upon the guaranty. The accounting between the parties must proceed as if such stipulation had not been made.

There is no consideration at common law for the agreement of release.

The argument upon this question of release, although not dealing extensively with adjudged cases or pointed discussions of the precise subject in elementary books, extended to quite a number of distinct heads. It is only to suggest, that in a case of importance like this, the Court has not overlooked the labors of counsel, we briefly recur to some of the more prominent points raised in connection with that subject.

At an early stage in this cause, the Court suggested there was no consideration for such a stipulation. The Code of Tennessee §3789, §3790, had not then been cited, and was unknown to the Court. But for this statute, we should still think the loan by a debtor to his creditor, of money or bonds, to be returned with full interest, is not at common law a sufficient consideration to discharge an admitted debt of three-fold the magnitude of the loan itself. Cumber vs. Wane, 1 Strange, 476, reported and commented upon in 1 Smith, L. C. *146, and the elaborate and learned notes—English and American, constitute the most satisfactory discussion of this question we anywhere find. In 18 Pick, 253, the giving a note for a less sum than that already due by note, was said to be no consideration for an agreement to recover it in full satisfaction.

In the briefs presented, cases have been selected whose facts are strikingly like those in this record. The 14 Barb., 607, Forsch vs, Blackwell, a canal contractor upon a settlement with his employer, endorsed on the back of the contract, a receipt for the sum, adding, "and this contract is hereby cancelled." The employer had wrongfully discharged the contractor, whereby he had lost large prospective profits. It was held that the payment of what was actually due for work done, was no consideration for the discharge of the claim for damages, and it was therefore void. There are many similar cases showing that the rule relied on is eminently applicable to the case before the Court. It remains unshaken as a general rule in the Federal Courts, and but for the local legislation in Tennessee, we should say it might have been relied on as decisive of this point. It is not, however, to be disguised, that this old technicality, often unreasonably applied, has had engrafted upon it so many exceptions where justice has demanded it, that but few instances remain where an agrement is fair in all its parts and fully performed by a debtor whose circumstances have been substantially changed in reliance upon such a release, that a Court cannot find precedents to protect him from suit; and we desire to say that we should consider open to an argument such a case, even although coming within the letter of the rule that the payment of a less sum is no consideration for the discharge of a greater. The provisions in the Tennessee Code that all compositions with creditors, and releases of all contracts, shall operate according to the intentions of the parties, so far as we can see, without any contrary suggestions of counsel who are familiar with its administration, would seem to abolish this common law rule. The only importance, therefore, which we attach to the absence of consideration is to look at it and the features of unfairness, and the absence of all doubt of the city's original liability, as elements which constrain a court of equity to apply in its most full extent, the rule upon which we rely, and upon which this point is decided, that he who seeks to be discharged from a just debt by the payment of a small part of it, by doing that indeed which the law deems no consideration whatever, must show on his part a full and complete performance. This just rule of the common law is not touched by the Tennessee statute. Compromises shall operate according to the

intention of the parties, but they must, in order to do so, be accurately performed.

The release was not good, as being the compromise of a doubtful claim.

It was also argued that whether there was consideration or not, and irrespective of the local statutes and whether there was hardship and unfairness, made no difference, because it was the compromise of a doubtful claim. If such it had been, and the compromise free from fraud, and had been completely performed, the argument is unanswerable. Neither fact is true, however, in this case. The only doubt which the proof shows was suggested, was whether the instrument of guaranty was one for payment at maturity of the paving bills, or of their ultimate collectability. The doctrine upon this subject is just what the proposition of the learned counsel involves. It must be the compromise of a doubtful claim. There must be such uncertainty as to raise in the mind of an ordinarily intelligent person a doubt of the liability. In a matter unnecessary to the decision of the case, it would seem out of place to analyze judgments. We say generally, only that the facts in many of the cases upon this subject were far more calculated to raise questions for discussion, than any controverted by the parties at the time of this settlement. See Story's Eq. Jur., § 138–138–i, (Redfield's Ed.,) 11 Mees. & W., 641, Edwards vs. Burgh; 2 Man., Gr. & Scott, 548, Wade vs. Simon; 42 Mo., 545, Long vs. Towle.

A recurrence to the discussions and citations in reference to the question of guaranty, shows that there has never been a question in the whole history of the law as to the meaning of such a contract as this. Its literal poplar acceptance too, is free from all doubt. Neither lawyer or layman with a fair mind, desiring to ascertain what duty was under a simple and plain sentence like this, would ever wring from it a doubt in reference to the City's obligation to put promptly into the hands of the contractors that without which their performance was impossible.

DAMAGES.—The City is liable to the Contractors for the difference between the value of the bonds it agreed to give, and the value of those it did in fact give, the same as if it had agreed to deliver chattels, or the bonds of other corporations.

The questions which have given us most difficulty, and about which from the first, we have had most doubt, are—can any, and, if so, what damages be given against the City for its failure to provide the sinking fund covenanted for in the second contract, and what shall be the measure of recovery for a failure to return the $240,000 of borrowed bonds? This covenant of guaranty was intended to give value to and went to the character of the thing it agreed to deliver in payment for the work performed by the defendants. It has caused us much study, and although we have been afforded all the assistance which able counsel could give—anxious to aid our attempts to arrive at correct results, such has been the extraordinary pressure upon our time from other duties, that we are compelled to concede that our conclusions, however much confidence we have in their rectitude, cannot be sustained by such an argument as we should, in better circumstances, have been glad to present.

Owing to the novelty of some of the applications of principles demanded by the decree we make, we felt authorized to depart from those general rules which prevent co-ordinate judges from troubling each other with their judicial difficulties. We have, in this instance, consulted several of Circuit and District Court brethren, and have received some most valuable aid from learned Justices of State Courts of last resort. They were all, without exception, decided in favor of the general principle that damages should be given, and that for the failure to return the borrowed bonds, the reason of recovery should be the market value only.

The measure of damages for the conversion of the note or other obligation of a private person, not intended for common circulation, and where there was no class of securities to which it belonged, which had by frequent sales acquired a market value, in an action by the maker of an instrument, is the nominal amount or *par* of the note or security. The same rule applies in an action against the debtor, when there is a failure on his part to deliver his own obli-

gations. The only compensation, with rare exceptions, ever given by the common law for the non-payment of money, or the non-delivery of the private securities of individuals for money, is the maximum legal interest allowed by the *lex loci contractus*.

That if the note of a private party be converted, its par value is the criterion of recovery, 10 Johns., 173, Murray vs. Barling; 3 Vt., 99, Buck vs. Kent; 12 N. Y., 313, Decker vs. Matthews; Sedg. on Dam., 1 B. and Ald., 528, Evans vs. Kymer, and many like judgments decide. There is no conflict in the decisions or commentators. The reason given is, that however below its par value may be the security, as the subject of immediate sale to the wrong doer, its negotiation has in contemplation of law subjected the maker to liability for its whole amount. This rule, counsel for the City say, in its proper extension sustains the position that the non-delivery of the *kind of bonds* described in the contract, cannot create a liability beyond the amount which the contractors have *subjected the City to pay*, by the negotiation of the bonds they have voluntarily received. If the bonds in this case are to be likened to the notes of private persons, this position would manifestly conclude all claim of the contractors for the damages allowed by the Master.

That the non-payment of money, or the non-delivery of the debtors' own obligations for money, subjects to no collateral damages, and that the principal and interest are the limit of recovery, is claimed to be the universal rule. 3, Parsons, Contr., 214. This is too elementary and unquestioned to require verification, if it is asserted only as a general principle. Much reliance is placed upon its manifold applications in analogous agreements. The *law*, it is said, in all such cases *conclusively* presumes there are no damages, because *money*, being the basis of the whole agreement, can always be obtained at the lawful interest. This old presumption, however, that money is always accessible on the instant, and that by no possibility can injury result which the statutory interest will not compensate, often so false in fact and frequently productive of the most substantial damages to the covenantee, caused by deliberate wrong and gross carelessness, has in modern times been frequently disregarded. Where, in the ordinary conventional process of commerce, upon which men are authorized to rely, losses

have occurred, impossible of prevention by an ordinarily careful creditor, and clearly anticipated by a willful or negligent defaulting debtor, the most substantial and compensatory damages have been given. The distinction between the obligation to deliver a chattel and the payment of money, has been rejected. Courts of the very highest character have set these examples. In the 14 Com. Bench, 495, S. C., 78 Eng. Com. Law, Rollin vs. Steward, the defendant having funds, against which the plaintiff drew his check, neglected to pay it, and the paper was protested. In an action for non-payment, the jury found £500 damages. The Court in deciding that substantial damages were lawfully awarded, although it deemed these excessive, approbate 1 B. & A., 423, Marzetti vs. Williams, ruling the same principle, and hold that although it was but a *debt* in defendant's hands, inasmuch as the plaintiff was a trader, and would in all probability be injured by the failure to pay his drafts, the jury might find substantial damages. Sedg. on Dam., 83 (4 Ed.), cites 14 Irish Com. Law, Rep., 43, Boyd vs. Till, where similar damages were given for a breach of an agreement to keep a sum of money in bank and to meet punctually plaintiff's drafts. Defendant having absented himself on a particular day, drafts were dishonored. Special damages were given for the loss of an agency by plaintiff, for the suspension of one branch of his business, and general injury to another trade. Rollin vs. Steward is cited and approved. We do not overlook the real spirit of these decisions. They do not overrule the old doctrine that where one private citizen owes money to another, the creditor cannot on failure to pay, claim compensation for losses in future operations, predicated upon his expectations of the money. The rule applicable in all other cases, excluding remote and consequential injuries, would apply. Indeed we do not understand that any, but the most special circumstances, will sustain such a recovery at all. It is only when the probability of collateral loss is great—growing out of the accredited forms of business in so much that the irresistible presumption is, that both parties must have known and contemplated the results.

We know of no decisions which have as yet applied even such a limited rule to any case where the injury resulted from the peculiar private circumstances of the plaintiff. In those cited, the

injury was such as might be presumed to attend similar defaults in reference to *all* traders, relying upon the regular performance of a financial duty, by defendant assuming a *quasi* public character—that of banker or broker. They partake strongly of the nature of an action on the case for negligence, although strictly in form *ex contractu*, and we do not suppose they intend to place in all cases the non-delivery of money in the same category with that of the like default in relation to personal property. In an extreme case where all the facts are *known* to the debtor, where he is, by the very face of the contract, by the nature of the subject, the amounts required and the financial condition of the creditor or contractor, fully apprised that punctual payment is absolutely necessary for the prevention of irreparable losses, whether damages in any possible case could be given beyond interest, it is not necessary to decide. But I desire to say that further examination would be requisite if this record demanded a judicial answer before I would refuse to hold the municipal government of a large and prosperous City like that of Memphis, which *ought* at least to represent its wealth, and its *gentlemen* to that decent degree of responsibility upon its lawful contracts, to which the English Courts have held its brokers and its bankers. The presumption of direct injury in cases like the present, is as forcible and general, it depends as little upon the exceptional condition of the contractor, as in the instances of traders whose checks are unlawfully dishonored. The contractor had as much right to rely upon the good faith of a *government* as upon the punctuality of a banker. When we take into consideration the magnitude of the work, the financial absurdity of supposing any man would place on deposit the million, necessary for its performance, and the knowledge derived, not from accidental information, but deduced with absolute certainty from the nature of the undertaking, that the proceeds of preceding portions were necessary for the completion of its successive sections—it would seem to present a case quite as urgently demanding substantial damages as any of those which have received such in judgment, and while the relief granted for the failure to provide a sinking fund, will not rest upon any assumption of a new general rule giving collateral damages for the non-payment of money, or the non-delivery of a defendant's private obligations

for money, still the modern refusal to apply the rule which upholds it, to cases not within its reason, gives us more confidence that we are not unwarrantably extending the principle upon which we *do* rely, beyond its true limits. The judgments which have likened these public bonds to chattels and held them, even in the hands of their makers, to be the subjects of sale, pledge and contract, wholly divested of their common law features as mere evidences of indebtedness, have sprung from precisely the same commercial reasons and necessities as those judgments to which we have referred, giving substantial damages for the non-payment of money.

This decision, however, is rested upon the assumption that the subjects of the contract are in all their features involved in the question of damages, to be treated like chattels in possession, and the public securities of other corporations or States. The rule of damages, therefore, in reference to chattels and the implications of law resulting from their reception and use, where a warranty has been broken, will be applied in this case.

We shall give the two questions of damages for failure to provide the sinking fund and to return the borrowed bonds, no distinct consideration. The same principles substantially govern each.

The measure of damages for the conversion of goods, or of the obligations of third persons, is their market value in all cases not accompanied with special injury to the owner. For the non-delivery of goods or the obligations of third persons of the *kind* and value contracted for, it is the difference between the value of the chattel or *bond agreed* to be delivered and that which is in fact furnished. The following cases among many others sustain this rule in its application to the non-delivery of the obligations of third persons, including bonds, shares in corporations, bank bills, etc.: 33 Conn., 489, Shelton vs. French, a recovery was had of the difference in value between a bond *with*, and *without* a guaranty; 1 Metc., (Mass.), 552, Coolidge vs. Bringham. The difference in value between a note with a genuine and a forged endorsement was given. Not the face of the note, but its *value* as shown by the evidence. And see 30 Pa. St., 210, Strother vs. Clark; 1 Cold., 241, Henneger vs. Isabella Copper Co.; 49 Barb., 382, Simpkins vs. Low; 50 Barb., 247, Otter vs. Brewoort P. Co.; 1 Gratt., 364, Endas vs. Board of Public Works; 12 Ill., 182, Smith vs. Dunlap;

6 Humphreys, 186, Baird vs. Troliver; 6 Dana, 1, Young vs. Givens; 11 Iowa, 410, Robinson vs. Harley; 5 Ohio, 180, C. & P. R. R. Co. vs. Kelley; see also Redfield on Wills, Part 2, p. 312, and Sedgewick on Damages.

That this is the rule in the case of the non-delivery of personal property, books need not be cited. It is entirely clear.

Within this principle the contractors claim their own case comes.

If these bonds in the hands of the corporation which makes them for public sale are to be treated for all purposes germain to the contest here, like chattels or other things in *esse*, like the bonds and securities of *third persons*, and other public securities; if they cannot be upon principle, and are not in fact, by the Courts treated in any degree like the obligations of *private* individuals, where they refuse to deliver them according to contract, the same rule of damages will apply as if chattels were the subject of the agreement.

It is fully conceded by the counsel for the contractors that no such rule could be applied, if the contract was for the delivery of private notes of citizens in ordinary business between individuals.

After much consideration we think no distinction should be made between the contract before the Court, and one between the same parties for the same work payable in the public bonds of another corporation where there has been a refusal to deliver those of the kind contracted for.

It is believed the adjudications already made in reference to the nature of these bonds, go quite beyond the necessities of the present case.

That these corporate securities, under seal, made payable to bearer, and intended for sale in the public market, are negotiable in as ample and full sense as the circulating medium of the country, the following adjudications which decide it in manifold applications determine: 21 How, 575, White vs. Vt. & Mass. R. R.; do., 545, Commissioners vs. Aspinwall; 23 do., 381, Zabriski vs. R. R. Co.; 1 Black, 386, Woods vs. Lawrence Co.; 2 do., 722, Moran vs. Commissioners; 1 Wall., 95, Mercer Co. vs. Hacket; do., 175, Gillespie vs. Dubuque; do., 257, Dunham vs. R. R. Co.; do., 291, Van Horstrop vs. Madison City; do., 391, Meyer vs. Muscatine City; 2 do., 110, Murray vs. Lardner; 3 do., 327, Thompson vs. Lee Co.; do., 654, Rogers vs. City of Burlington; 7 do., 407, R.

R. Co. vs. Howard; 5 do., 197, Campbell vs. Kenosha City; 1 Beas., 329, Morris Canal & B. Co. vs. Lewis; 1 Stockt., 667, Morris C. & B. Co. vs. Fisher; 3 Kerr, 599, Mechanics' Bank vs. N. Y. & N. H. R. R.; 25 N. Y., 496, Brainard vs. N. Y. & N. H. R. R.; 8 Paige, 527, and 2 Hill, 159, Delafield vs. State of Ill.; 41 Barb., 9, Conn. Mut. Life Ins. Co. vs. C. & C. R. R.; 3 Duer, 660, Brown vs. Ward; 15 Conn., 502, City of Bridgeport vs. Housatonic R. R.; 31 do., 342, Bulkly vs. Welch; 20 Ind., 467, E. & H. R. R. vs. Hunt; 18 Ind., 96, Com'rs. vs. Bright; 13 do., 161, Junction R. R. vs. Cleaney; 2 Metc., (Ky.), 79, Maddox, et. al., Councilmen, vs. Graham; 8 Gray, 575, Chapin vs. Vt. & Mass. R. R.; 31 Miss., 216, Craig vs. City of Vicksburg; 18 Gratt., 338, De Voss vs. City of Richmond; 11 Wis., 488, Mills vs. Gleason; 19 Iowa, 213, Clark vs. Des Moines; 16 Ohio, St., 145, B'k. of Ashland vs. Jones; all these judgments assert the general rule by which we have preceded them. Many of them go further and decide that such bonds are to be deemed essentially chattels, and things in *esse*, and not mere choses in action. This has been done as often as exigencies required it.

No judgment conceding their negotiability, has denied the additional feature of their similitude to chattels. Pennsylvania alone decides differently, confessing that this local rule is exceptional, and at war with well settled law here and in England.

It would be useful and very persuasive evidence of the conclusions at which we have arrived, to follow the numerous applications of this general principle through the cases which announce it.

The pressure upon the Court and the absence of all clerical assistance which forbids elaborate examination, render this impossible; a few instances only in illustration of how fully the Courts have likened these bonds to chattels, and how substantially they have refused to apply the old rule of the Common law, applicable to the non-delivery of the evidences of indebtedness of individual defendants, to bonds like these, can be referred to.

If the note or other chose in action of a private party is pledged as security for a debt, the creditor, owing to the nature of the subject, takes only the power of collection, not that of *selling* it. See 1 Stock., 667, Morris Canal Co. vs. Fisher; 1 Beasley, 323, Morris Canal Co. vs. Lewis; 5 Duer, 29, Wheeler vs. Newbold, S.

C., 16 N. Y., 392, on appeal; 3 Duer, 660, Brown vs. Ward; 12 Johns., 146, Garlic vs. James. The reason given is that such securities have no *market value* like chattels, are not so dealt with in commerce and—that there is therefore, no implied power of sale. Where bonds of a corporation intended for general sale, like those now in question, are thus pledged, this rule has been in vain invoked to invalidate their sale by the pledge. That *literally* they come within this rule is conceded. That they are choses in action, evidences of indebtedness, is said; but of so different a nature from those included in the principle relied on, that they are to be treated like chattels, and must be subject to the *same rule and property incidents*. In 5 Duer, 29, Wheeler vs. Newbold, S. C. on appeal, 16 N. Y., 392, in deciding that private notes could not be sold, they go upon reasons necessarily involving the right to do so, if they had the incidents of such securities as those before us. The following case in 3 Duer, 660, Brown vs. Ward, had been tried, but not determined, when the preceding one was decided in the Superior Court. In the latter, the public bonds of a railroad company had been pledged and sold like personal property. The Court sustaining the sale expressly distinguished the case from Wheeler vs. Newbold upon the ground that the subject of the pledge was to be treated like things *in esse*, and not like the private notes in that case. In 1 Beasley, 323, Moris Canal Co. vs. Lewis, the Company's own bonds were pledged to secure its own debt, and sold at about thirty cents on the dollar.

The Court says the bonds in the hands of the company making them were alike the subjects of pledge and sale as were personal chattles. They were not to be treated like those of private persons. See, also, 1 Stockt. 667, Morris Canal Co. vs. Fisher. There are other similar judgments but this principle is undoubted. These have been particularly noticed only to say, that every reason upon which this whole class rests, shows that if the same defendant had three different classes of bonds—1st, 2d and 3d, worth according to the priority of their respective liens, 100, 75 and 50 cents upon the dollar, and they should make a contract for work, or for the purchase of engines and cars, agreeing to pay therefor in their first mortgage bonds at par, and should deliver instead those of the third class of one half their value in the market, the

company would be liable in damages for the difference in value between what it agreed to and what it did deliver. Freed from all questions of waiver and unembarrassed by the old notion that interest is the measure of damages for the non-delivery of money, or a chose in action for money, and treating the subject of the contract as what the Courts now affirm they are, chattles and things *in esse*, no plainer proposition can be stated than that the breach of the contract subjects the violater to substantial damages.

21 Wis. 217, Hesbranch vs. Milwaukee; 11 Wis. 488, Wills vs. Gleason; 18 Wiss. 322 Cody vs. Watertown, and other similar cases, although not in their principle distinguished from 21 How. White W. V. C. vs. Valette, and the large class to which it belongs, are in their facts so like the case before the Court as to entitle them to special mention. In the 21 Wis. the corporation contracted to pay for a public work in its bonds at par. City officials without special resolution agreed, if the contractors would proceed, they should have the bonds much below par. This modification was sanctioned by the Court of last resort. It overruled manifold objections to the general power of the corporation to make such an agreement, and if it had to the authority of its officials without formal corporate action to do so. A similar transaction between citizens dealing with private notes would have been illegal upon many common law and statutory grounds. Reposing, however, upon the peculiar character of these securities, it was held the city might dispose of them at their market value. The whole treatment of the case necessarily includes the propositions essential to give these contractors substantial damages, where the corporation has contracted to deliver them one kind of bonds, and has constrained them to accept another. The other citations quite as forcibly, for our purpose here, apply the principle which holds these securities to be subjects of sale, and payment by the city at the common price.

It is well settled law, too, that when a citizen desires a loan of money, and makes his private note for the purpose of raising it, that no device of sale, pledge or other collateral transfer can protect the ownership of him who receives it from the imputation of usury if taken at a price less than that which will allow him lawful interest. 7 Humph., 450, May vs. Campbell; Gilmer (Va.) Co.,

Taylor vs. Bruce; 10 N. Y., 198, 9 B. Mon., 530; 8 Cowen, 689. The judgments are very numerous to this point.

In circumstances identically like those where private paper has been held void for usury, a like disposition of this class of bonds has been held not to come within this rule. Municipal, railroad and other public and *quasi* public corporations, have, in numerous instances, where the sole object has been *a loan*, published and negotiated as such, and where no statute authorized a sale below par and where the question turned solely upon the essential and substantial *character of the security* sold, have disposed of their bonds at rates giving the purchaser manifold the lawful interest, and it has been adjudged not to be usurious.

The point has been in all these cases directly raised, and the judgment always rested upon the answer to the question, are they to be treated like *chattels* or like the *choses in action* of private persons?

The answer has been that where a corporation makes such securities for vendition in the market, they are to be treated as if it offered for sale its personal property, or the notes and bonds of other corporations.

In the 21 Hon. 414, Canal Co. vs. Valethe, mortgage bonds of the corporation reciting that they were intended for a *loan*, were *paid* at fifty cents on the dollar to a contractor.

It was claimed that the transaction was usurious, but the Supreme Court going upon the nature of the securities and the transaction, held it to be lawful.

In 1 Stockton 667, Morris C. & B. Co. vs. Fisher, like bonds of the company to double the amount were pledged to secure a debt. In support of the plea of usury it was argued that it was but the pledge of one promise to secure another, that the legal consequences could not be different than if the whole transaction had been evinced by a single contract. It was quite conceded by the learned Court that had it so been, or had the dealing been with the private paper of an individual in a like transaction, it would have been unlawful; nevertheles hold that these *public securities* in the hands of the corporation which makes them as well as in those of third persons are to be treated like other personal property, and the objection was not sustained.

In the 16 Ohio St. 145, Bank of Ashland vs. Jones, bonds of a railroad company having been guaranteed and sold at a price under par, and suit brought upon the guaranty, among other objections urged was that of usury. In the argument by which it was overruled the Court say the bonds in the hands of the original makers "are like chattles." The guaranty is substantially treated like the warranty of personal property, and see the cases of Curtiss vs. Leavett, 17 Barb. 311; S. C. on appeal, 15 N. Y. 800; Leavett vs. DeLany, 4 Comstock 364, 18 Barb; 456, Tracy vs. Talmadge, S. C. 14 N. Y., 162; 24 N. Y. 125, People vs. Mead. The argument and illustrations to be found in this whole class of judgments leave nothing for the Court by way of analogy or extension of their principles, in order to decide that the delivery of a bond of less market value, and of materially a different character from that agreed upon, subjects the corporation to damages. The case comes within the conceded truism that the measure of recovery for the breach of an express warranty in the sale of personal chattels is the difference between the value of the thing as warranted and its value as actually delivered.

Numerous decisions, many of which are obligatory upon this Court, determine principles which we think brings the subject of this contract within the rule. That in the case the City should respond in damages in justice to the contractors, is apparent from the fact that upon a resale of some of these bonds with like warranty these very defendants were held liable to this measure of damages, Calvan vs. Brown & Co., Supreme Ct. Iowa, 1871.

In the hurried examination we have been compelled to make, we find but one case of the exact application we make of these principles to the question of the liability of the contractors, for the bonds loaned, though we can affirm with much confidence there are others. In Tracy vs. Talmadge, 18 Burk, 456 and S. C. N. Y. 162, the State of Indiana sold its own bonds to a trust company. She sale was held void for illegality, but the company was held liable to the same measure of damages as if it had disposed of the bonds without any contract. The Court below decreed their payment at par. The Superior Court modified the judgment in this respect and held their *market value* to be the true criterion. The case is one of the most elaborately argued upon the question of illegality

to be found in the books. That of damages was not fully discussed, but from the character of the counsel, its re-argument in the Court of Appeals, the modification of the decree in that Court upon this very point, it is very high evidence of the law that where such securities are converted the measure of recovery in a suit *by the maker* is their *market value* and not as in the like case of the private note of an individual, the sum which he may be ultimately compelled to pay. The different rules are naturally adapted to probable financial consequences of the act or omission complained of. The private citizen has circulating no class of securities having a well known price, and which, in theory and in fact, he can, at any moment, purchase at market standard. If his note is borrowed and not returned he must pay its amount. If the bonds are converted or withheld which have an established price at which they are in fact purchaseable no possible injury beyond it can result from withholding them. Every familiar rule regulating the right to damages, that which stops at the limit of loss but gives all which the real loss is, will sustain both branches of this portion of our decree. They will compensate for refusal to deliver the more valuable bond agreed upon by the City, and will restrain its recovery to the value in the market of what it loaned and what it can still purchase for the sum allowed by the Master.

There is one objection to this limited measure of recovery by the City which deserves notice and which could not well be dealt with in other connections. It was said by the corporation's counsel that whatever other powers the City might exercise and howsoever its officers without vote might bind it in the ordinary and accustomed course, at least there was no power anywhere in the charter to make its bonds for the purpose of *loaning* them to third persons, and such a loan, upon the face of the papers, this transaction was.

As a general proposition, if it were simply a loan and no more, I should say counsel are right. Few such corporations have any power of making negotiable securities solely for the purposes of loan and circulation. But here, although called a loan, being made to its own creditor and in furtherance of an object it was its duty to promote, it would seem quite clearly beyond the reach of any such objection. It is, however, wholly immaterial here,

because if illegal then, as is decided in the case of Tracy vs. Talmadge just cited, the contract being void, the defendant will be held to have wrongfully converted the bonds and the measure of recovery be what is here allowed, their market value.

Although quite in another connection, and having reference to a matter before disposed of, we add that of this point is well taken, if the contract of loan is void for illegality, it necessarily renders also void the *release* which is a part of it. If void in part, it is so, of course, in whole.

It is to be regretted that a novel application of general doctrines, one believed to be beneficent in all its rightful limitations, should for the first time come before the Court, in circumstances well calculated to startle a conservative judgment and challenge the severest criticism of the principle which allows such damages at all.

We have endeavored, however, to disregard the accidents of this record, and not to be deterred from an assertion of what was thought to be a right rule, because in the instance before us the proof forces a decree beyond what had then been a fit admistration of the City finances, ought to have resulted from similar defaults. There should with public confidence in the integrity and intelligene of the municipal government, be no such extraordinary difference in price as the witnesses establish. The City, for some reason, introduced no testimony whatever upon the difference in market value between bonds secured by a sinking fund and such as were delivered in their stead.

It may be true, that such was the reputation of the City government, that no counter proof upon this point would have varied results; still, so far as the amount of damages is concerned, it would be more satisfactory to know whether such a consciousness withheld the efforts or a reliance upon the doctrine that the whole inquiry was immaterial.

That a Superior Court will adopt our views, we are not confident; but being certain that at an early day the general principles upon which we rely, must be adopted unto our law, we have not hesitated to declare it now, although no precedent precisely applicable has been found for our decree.

WAIVER.—The acceptance and use of the bonds unsecured by a sinking fund was not a waiver of a right to damages for a failure to provide it.

The acceptance and sale of the bonds was not a waiver of the claim for damages. The guaranty in this case is not technically a warranty of the bonds. It is for the performance of a collateral act effecting their value. The legal and financial consequences, however, are precisely the same as if the City had warranted the bonds to be of a particular character.

Their treatment, therefore, has been and will be the same as if they were the special subjects of the guaranty.

We are referred to no decision giving any countenance to the position that mere acceptance and use by the contractors is *per se* a waiver of the breach of warranty on the part of the City. Counsel have not relied upon them, but there are a few decisions, holding that in an action for the price of goods sold with a warranty the defendant could not show the breach if he had accepted the property, a few commentators, misapprehending them, have erroneously supposed they rested upon the ground of waiver; and that there could be no recovery in any form, for a breach of warranty after a voluntary appropriation of the subject. Those judgments, however, announce no such rule, but on the contrary, some of them expressly and all impliedly, concede there may be a cross action for the damages notwithstanding the acceptance and use. The decisions say only, that under the general issue in an action upon a contract, there could be no partial defence. It is a mere question of pleading and form of action.

The general doctrine that the vendor of personal property with warranty may maintain an action for the breach, notwithstanding he has accepted and used it, is well established in this country, and especially in the Federal Courts. 9 How, 213, Withers vs. Green; 23 How, 150, Benjamin vs. Hilliard; 20 How, 150, Lyon vs. Bertram. Numerous similar cases are found in the Circuit Courts. It is, however, by no means peculiar to the national jurisprudence, for in its earlier history, there being some decisions tending the other way, they adopted the rule we have announced, because it was supported by so many State adjudications. Every American treatise announces the rule which is applied in the following judg-

ments. They decide and illustrate the principle that waiver is a question of fact depending upon the circumstances of each case, and that the law will not presume a waiver where it is not clear that the parties intend one. 14 Conn., 411, Kellogg vs. Denslow; 29 N. Y., 358, Reed vs. Randall; 14 N. Y., 598, Miller vs. Eno; 3 Rawle, 28, Borreckins vs. Beavan; 4 Har. & Gill, 496, Osgood vs. Lewis; 2 Pick., 214, Hastings vs. Lovering; 4 Kansas, 476, Field vs. Kinnear; 18 Ill., 420, Babcock vs. Price; 1 Mite., 552, Cooley vs. Brigham; 1 H. Bl., 17, Fielder vs. Starkey; 2 Term., 745, Buchanan vs. Pamshaw; Law Rep., 2, 2, B., 447, Hayworth vs. Hutchinson; 1 Parsons' Contr., 591, (5th Ed.). Benj. on Sales, 468, 522, 678, et. sq.; Sedg. on Dam., 819, (4th Ed.).

Within the rule of these cases, the acceptance and use of these bonds cannot be deemed a waiver of a right to damages. The bonds must either have been sold or the work must have stopped. It is an irresistible inference from the proof that every City official knew the rate at which they were being disposed of—one utterly ruinous to the contractor if he was to have no remedy for the City's default. So far from the circumstances under which the parties acted indicating an intention on one part, or expectation on the other, of waiver, the presumption is much stronger of an understanding that they would be sold at a discount and the loss made good.

Under the foregoing opinion, a further hearing of objections to the *amounts* as found due by the Master, after overruling all except that to the item for failure to create a sinking fund, the City Attorney applied for and had leave to take further proof on that point. Additional proof was taken and after consideration thereof, on another day, in disposing of this last question, Judge Emmons substantially said, he had asked the attendance of the Master at his chambers that he might avail himself of his familiarity with all the testimony, and had been favored with an able and instructive analysis and argument in writing, (which, upon this point, is appended) of the proofs on this point, and the reasons why he would not under the additional proof reduce this item.

It is said all but two of eighteen witnesses, substantially, either literally or by fair inference from their concessions, still say the

bonds with the sinking fund created, would bring eighty-five cents, at which they are estimated in the Report.

The general truth of this is conceded if we rely on their verbal statements. But I quite agree with the criticism of the learned Attorney for the City, that the questions and the course of the examination show they had before their minds an untrue interpretation of the meaning of the covenant. They in a large degree base their replies upon the supposition that when the bonds are offered for sale, the *money* to pay interest and principal is in the hands of a trustee awaiting their maturity. Had the City fulfilled the letter and spirit of its covenant, this would not have been so. Such an assumption is untrue and the valuation based upon it is erroneous. A sinking fund contemplates no such conditions. An ordinance providing for a tax, its assessment at the regular time and a deposit of the money in its own officers' hands, is all the covenant demands. The first year the bonds would be increased in market value in proportion to the public confidence in the good faith of the City in the collection and application of the tax. In the earlier disposition of the bonds, all this would be executory. If the City had performed its agreement the first year, confidence would have been greater in the second, and as the fund year after year increased for retiring the bonds at maturity, if it had not been used in buying them up at current rates, the securities would materially have advanced in price; but at every period a leading element in *market price* would have been *confidence* in the City's *integrity*. And while the law does, as witnesses should in estimating value, *presume* the covenant *would* be fulfilled, it yet remains true that the same *bond* issued by a corporation which always kept its promises would bring a higher *market* price than if issued by another which frequently violated them. The testimony fails to convince that a municipality whose securities were at or below fifty cents, could instantly raise them to eighty-five by a mere agreement to provide for their payment in a particular mode. It would require a year or two of strict performance to increase confidence enough to greatly affect prices.

It is said by the Master that it is unseemly and unjust to suffer a municipality to obtain a reduction of damages on account of its own ill repute—to aver in a Court of justice that its promise was

worthless on account of the low character of its government. Incongruous as this may seem in some sense, this is just what the law allows it to do. The inquiry is, what is the difference in market value between the plain bond and the sinking fund bond, and this does in a large degree depend upon the reputation of the City. The morals, the self-respect, or the decency of such a defence, is not for Courts which must administer the *law*, but rests with the gentlemen of Memphis.

It is urged that the bonds *thus secured* might have been used by the *contractors* at eighty-five cents. This may be so; but the Courts cannot look to the peculiar circumstances of parties. Damages often result to proposed vendees in their private affairs, far exceeding the difference between the market and the agreed price, or between the value as delivered and as agreed to be delivered, but the law considers only the *market* value. This is the rule in all cases where the contracts are general in their character like the one in judgment before the Court.

But more earnestly than all else, it is argued that by calculations of the price to be paid in money and the *bond* price for work, it appears the latter were reckoned at eighty-five cents; that the parties *agreed* they were worth that sum. And as argumentatively connected with this view, it is said if the agreement for bonds had been abandoned wholly and the City charged with the *cash* price, crediting it with what the contractors have actually received, the same sum would be *due* as the Master has allowed. The claims of *justice* would, we grant, thus be answered. The judgment which in the forum of conscience might be rendered, would be sustained by these considerations. But the sole question here is, *market value*; not what did the parties *estimate* them to be worth. They might have been, and most likely were, *mistaken*. There is no covenant that the bonds should be worth any particular price that secures only certain conditions supposed to increase their value. Whether it would do so or not, neither could tell, and both parties acted in uncertainty.

We can look at this feature only as *evidence* of value, not conclusive, or even of a high order. Adding it however, to the somewhat preponderating testimony of the contractors, we shall be authorized to fix the bonds at seventy-eight cents. This will reduce

the damages some $25,000. But for these considerations and an inclination to give the contractors all we possibly can without violating the law, we should agree with the City Attorney, that seventy cents was nearer what an intelligent criticism of the more recent proofs alone would authorize. We draw largely upon what we deem the real merits of the issues in a popular sense to reject his arguments. The contractors have fairly performed the work. The City has been benefitted many millions by the labor. The improvement was a necessity and has abundantly justified the action of those who launched it.

The decree falls somewhat short of what they would have received had the City paid as all cities should, in money, for the labor. But it is as near that standard as insuperable technical obstacles will suffer us to come.

Opinion of the Master on the point of damages referred to in the final opinion of Judge Emmons.

"The fact that the parties entered into contracts for street paving, wherein it was agreed to pay one price per square yard, if paid in cash, and a given higher price if paid for in bonds, shows that the contracting parties had a clear understanding, if not agreement, as to the relative value of bonds to cash. By a calculation based on such cash price, the Master found the amount in his report. That is, from the aggregate value of the work done at the prices agreed upon payable in cash, deduct the full value of all the bonds that were paid, and the balance is the sum as reported due the contractors. A revision of such calculation, with a single item of detail in the proof now definitely fixed, still gives the same amount into less than $2,000.00.

Measured by the proof before the Master, of the difference in value between the bonds delivered and those promised, this item would have been several thousand dollars more than thus reported, for such value was fairly proven at eighty-seven cents. The additional evidence now just taken does not change the views of the Master. The preponderance of proof still gives a higher value to the secured bond than adopted by the Master. The following considerations still remain untouched.

First. The relative prices in cash and bonds show the City received eighty-five cents in paving for each dollar of bonds.

Second. The City represented by its officers it would so secure its bonds as that they should be worth this eighty-five cents at least. In reliance thereon, as well as on their own judgment of the value of secured bonds, the contractors agreed to and did give such eighty-five cents. The same amount of work they did for eighty-five cents in cash they did for one dollar in bonds. If the bonds were not to be worth eighty-five cents, they were guilty of the absurdity of agreeing to do work for less than it was worth, for the privilege of receiving their pay in bonds rather than in greenbacks.

Third. These representations of the City, the execution and performance of the contract by the contractors in reliance thereon, go far in the mind of the Master to establish in equity a warranty of the value of the bond, it proposed to issue.

Fourth. Even if the evidence satisfied the Master that if the City had created a sinking fund adequate to guarantee the payment of interest and principal of the bonds, and notwithstanding that had been done, that the bonds would not have sold for more than seventy cents in the market, still under all the proof in this case, the Master cannot say but such bonds would have been worth *to the contractors* eighty-five cents. The placing of local special bonds at special rates by negotiation is a fact too common and important in the commercial world to be ignored. These contractors certainly believed the secured bonds would have been worth eighty-five cents to them, or they would not have given that for them.

It seems to the Master that the testimony of corporators of this City, in extenuation of its violated promises, that if it had performed its covenants thereby would have been shown the falsity of its representations of the value of such bonds, should have little weight in a Court of Equity. It is in effect allowing a party to violate his contract and then limit his liability for the breach by confessing to his own deceit and mirrepresentations in the making of the contract.

The City has failed to pay as it agreed to, and it cannot be unjust to it to require it to pay the fair cash value of the work, giving it credit for the full value of all it has paid."

U. S. Supreme Court,

OCTOBER TERM, A. D. 1873.

THE CITY OF MEMPHIS, Appellant,

vs.

T. E. BROWN, Survivor, &c., Appellee.

BRIEF FOR APPELLEE.

S. SIBLEY.

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IN THE

Supreme Court of the U. S.

THE CITY OF MEMPHIS,
APPELLANT,
vs.
T. E. BROWN, *Survivor, &c.*,
APPELLEE.

Bill and Cross-Bill.

ARGUMENT FOR THE APPELLEE BY S. SIBLEY.

This action grows out of the paving of thirteen of the principal streets of the City of Memphis during the years 1867–8, under contracts made therefor (originally with other parties, for whom T. E. Brown & Co. were substituted by mutual agreement) by the city in 1867. It embraces the subject matter of three separate suits pending at one time in the Circuit Court—two of which were actions at law brought by T. E. Brown & Co. against the city, and the third was this suit brought by the city after the others. This latter was instituted in the State Court and removed by the defendant. After the oldest law action had been set for trial on a day fixed, the city, by counsel, orally moved the Court to consolidate the actions, and it being conceded by all the counsel, that each case would involve an investigation of substantially

the same law and facts, both important and complex, the Conrt directed the consolidation of the law actions with this equity cause, which was done by the answer of the defendant now herein, and also in form, by the cross-bill, and the law actions were stayed or dismissed. For the delay thus caused the defendants, the counsel for the city declared a ready assent to all proper orders that could speed the cause to trial. The firm of T. E. Brown & Co. was composed of Mr. Brown and Jervis Langdon. Mr. Langdon died during this litigation. But for convenience and brevity, I will use the plural in this brief.

The following is an abstract of the pleadings in the cause:

THE BILL charges that contracts in writing were made between the City of Memphis and Taylor. McBean & Co., on March 11th, 1867, for the paving, with Nicolson pavement of Madison, Second, Adams and Union streets, embracing the usual detailed specifi cations of the work, and providing for its completion in 150 days, excepting delays from storms, &c., and for the payment of the price per square yard fixed in the contract, the city agreed to pay or cause the same to be paid by the abutting lot-owners, one-half cash, as each section of 400 feet was completed, and the other half in the notes of such lot owners, due in 30, 60 and 90 days, which payments the city guaranteed, without authority; That the city should, in like time, pay for the paving of the intersections of streets and alleys; That the city would grant the use of the Nicolson patent at 15c. per yard, to be deducted from the amount due from the city for any work it was liable for.

A printed copy of the contract is attached.

2D. That July 16th, 1867, contracts were made between the city and Forrest, Montgomery & Co., for the like paving of Shelby, DeSoto, Beal, Poplar, and Main streets, according to like specifications, to be completed by July 1st, 1868, for which payment was to be made at the completion of the work, in Memphis

City six per cent. coupon Paving Bonds, running 5, 10, and 15 years, the principal and interest to be guaranteed and provided for by a sinking fund set aside for that purpose, the Bonds to be taken at par; That the city should grant the use of the patent at 25c. per yard, to be deducted from the contract price per yard of the paving.

3D. That thereafter said contracts were assigned to Taylor, McBean & Baldwin, who agreed to perform the same in the stead of Forrest, M. & Co.

4TH. That thereafter, October 15th, 1867, said contracts were changed as to the *mode* of payment *for the paving done opposite the lots of individuals*, which, it was agreed, should be thenceforth the same as the first, or "cash" contracts; and the *price* was changed from $5.25 to $3,89 per yard, on Shelby, and at similar deductions on other streets, and there was added 40c. per square yard for grading, and the patent fee was released as to all paving at intersections, and opposite public grounds.

5TH. That thereafter, May 5th. 1868, "all said contracts and all the unsettled and unadjusted claims due said contractors by the property holders and the city," were transferred to T. E. Brown & Co., who agreed with the city to perform the same in the stead of their said predecessors.

6TH. That the city has paid on the first contracts in cash, or its equivalent, $94,720.96, but of which, $20,000 being a note of the city's, was returned; and $40,000 was city scrip, on which the contractors claim a loss of $21,667.50; and $7,200 was the agreed value of $12,000 of City Bonds, which should be increased to $12,000.

That the work under said first contracts, for which the city should pay, amounted to but $74,731.39.

7TH. That on the second contracts the city paid $213,000 in its Bonds, while the work chargeable to the city amounted to but $144,142.86, deducting royalty. That defendants are also chargeable with $317.50, interest on bonds when delivered, and $240,000 for that amount of bonds loaned, and $35,000 for city acceptances loaned; and in all with $488,317.60.

8TH. That the city loaned defendants $275,000 of its 30 year 6 per cent. bonds under two loan contracts, which were made by the city without the authority of law, as follows: $100,000 August 26th, 1868, returnable in 18 months, with interest, and $175,000 November 20th, 1868, returnable in 18 months, with interest, in consideration of which last loan, defendants agreed to release the city from all paving contracts, unless the Supreme Court should decide the lot owners to be not liable to pay for the paving. That said loans were secured by the delivery of paving accounts to the city, for an equal amount: That the city delivered $99,000 on the first loan, and $240,000, bonds, on the second loan, and its acceptance for $35,000 in the place of so many bonds.—That the city has collected none of the paving accounts so pledged to it, but that defendants have collected many of them, and are collecting others in violation of the agreement: That said loans were made without authority of law, and Bonds and acceptance have never been returned, nor the interest thereon paid: That defendant is a non-resident of Tennessee, and is prosecuting suits in the U. S. Courts for the collection of said paving accounts notwithstanding tne release aforesaid: That defendants failed to perform the said contracts *within the time agreed*, which was the limit of the license to the city to use such patent, and by such breach the city was damaged in the sum of $298.90 already, additional for the use of such patent; and $4,883.57 it was further liable to have to pay to one Haywood, the interme-

diate licensee of such patent between the City and Nicolson for loss *he* sustained because the city had not laid so many square yards within the life of his license which was also the day of the completion of the contracts, as provided in such paving contracts; That the defendnat owes the city, in all, $352,746.68, besides interest.

It prays an injunction against further collection of paving accounts, and for a discovery of the sums collected and for an accounting and decree for the amount found due.

General Statement of Account to the Bill of the City.

T. E. Brown & Co., (on Bond Contract)		Dr.
On account of Bond Loan, - -	$240,000	
" " City Acceptance, -	35,000	
" " Bond payment for work, -	213,000	
" " Int'st on Bonds as delivered,	317.50	
		$488,317.50
	Cr.	
(By work done),		144,174.64
		$343,174.64

T. E. Brown & Co., (on Cash Contracts,)		Dr.
On acct. of bills payable, - -	$42,520.96	
" " City Warrants, - - -	40,000.00	
" " proceeds of Bonds, (12 bonds)	7,200.00	
" " loss on sale of Bonds, - -	4,800.00	
" " City accptance, pd. 1st Nat. Bk.,	5,000.00	
" " R'yalty, amt. cl'md by H'ywd,	4,483.57	
" " extra 1c. paid Goodwin Larned,	298.90	
		$104,303.43
Cr.		
On acct. of pavements laid on various sts.,	$83,557.85	
" " extra bills allowed by Board,	734.93	
" " Franciola bill assum'd by city.	438.61	
" " Bills payable, col., returned,	20,000.00	
		$ 94,731.89

OVER-PAYMENTS.

On Bond Contract, - - -	$68,174.64
City acceptance, - - -	35,000.00
Bond Loan, - - -	240,000.00
On Cash contract, - -	9,572.04
Total, - - -	$352,746.68

THE ANSWER OF T. E. BROWN, as survivor, &c.,

1 to 5. Admits the execution of the contracts: the transfer of them and all claims thereunder, and the substitution of T. E. Brown & Co. as contractors therein, and the change in the 2d contract alledged: but denies that the pay under the 2d contract was due only at the completion of the work: and avers all payments were due when each section of 400 feet was completed: denies that the work was not completed as agreed, and avers that on many sections a majority of the lot owners still refuse to pay, whereby the time of completing such work has not yet expired, by the terms of the contract. That the work was all complete about January 1, 1869, and accepted and approved by the city.

6TH. Denies the correctness of the account by the city, and avers the work therein referred to amounted to $94,497.48, and that the payments therein recited amounted to but $52,493.46; avers that defendants assumed said contracts on the faith of the representations of the city that its account of $17,322.50 for scrip was true, instead of its nominal amount as now claimed by the city, of $40,000.

7TH. Admits the payment of $213,000 in bonds, and avers $55,652.12 thereof were, by agreement, applied as a cash payment, at 52 cents on the dollar, to wit: $28,871.62 on the 1st or "cash" contracts. That after such application there remains due on the first contract forpaving at intersections, $13,562.70.

8TH. Admits the Bond and Loan Contracts were made without authority, and so void, and avers that said bonds had a well known market value and were a market commodity, and worth 50c. on the dollar, that they were delivered and received for the well known and declared purpose of sale by defendants in the market to raise funds to carry on the work of paving, and defendants are ready to account therefor at such value; and that 99 only were delivered on the 1st, and 230 under the 2d loan contract, long after they were promised; that defendant received them in good faith; that the city owed defendants then a much larger sum of money, and well knew defendants must have means to prosecute said work; that on defendants' demand for payment, said city proposed the first loan from motives of policy, and on the second loan exacted the contract for a release; that the city knew defendants' necessity for money to prosecute said work, and loaned said bonds to enable defendants so to do by the sale thereof; that defendants did sell the same at 50c., which was their highest market price, and still is; that the city undertook the collection of its paving accounts, and payment thereof to defendants within said 18 months, wherefrom defendants could buy and return the amount of bonds so loaned, which the city wholly neglected to do.

Defendants discover that they have collected $8,337.60 of the $275,000 bills delivered to the city, and avers the right so to do, (1), because it is so agreed in the 1st loan, and defendants have deposited over $40,000 additional bills with the city. (2) because such bills exceeded the bonds actually loaned by $40,000, all of which sum defendants are in any event entitled to receive; and aver that all the suits brought were brought by the City Attorney with assistance of Messrs. Humes & Poston, who were retained by defendants at the special request of the city.

Defendants further answering aver (which averments are also embraced in a cross bill) the execution of contracts for paving which are set out in the first clause of the bill, as made under one letting, and as all alike except in the price for the paving; and the execution of contracts mentioned in the second clause of the bill under the second letting, and embracing Shelby, Beal, DeSoto, Jefferson, Poplar, Old Madison and Main streets, and Charleston Avenue, being in all respects alike, except also as to the price, which varied somewhat on different streets; and avers the transfer thereof, and all claims thereunder to T. E. Brown & Co., and the performance of the work by them, and the comcompletion thereof complete about the 1st of January, 1869, and the acceptance thereof by the city.

That as an inducement to said 2d contract, the city represented that it would pay for the paving as it progressed in 5, 10, and 15 year Memphis City six per cent. coupon Paving Bonds, the interest and principal to be guaranteed and provided for by a Sinking Fund set aside for that purpose; that although the outstanding bonds (some $2,000,000,) being unsecured and the interest but irregularly paid, were worth but 50c. on the dollar, yet the paving bonds proposed would be worth 90 cents on the dollar; that bids were made and said 2d contract executed on the faith of such representations, and with like covenants; that such bonds so secured are a first-class commercial security, and worth in the market about *par;* that it was in the contemplation of the parties that the bonds so paid would be pledged, or sold to provide money for doing said work; but said city refused to provide such fund, or in anywise to secure or assure the payment of either principal or interest of such bonds, and neglected to pay the interest on said bonds, and though it delivered to the contractors $313,000, wherefor they paid 90c. on the dollar in such work, yet because of such breach of its contract, said bonds were and are worth no more than 50c. on the dollar, and after

retaining them for some months, the contractors sold the same at that price, to aid in the performance of such contracts; and that by such misrepresentations and the breach of its covenants respecting such bonds, defendants were damaged in the sum of $143,000.

2D. That during the progress of said work, the city changed the grade, thereby causing additional grading to be done by T. E. Brown & Co., of the value of $1,500.

3D. That by said contracts the city reserved the right at any time to suspend the paving, but bound itself to pay to defendants, any loss thereby sustained, if suspended without the fault of defendants, and that at several times the city did suspend the work without the fault of the contractors and to their damage $4,500.

4TH. That it was the duty of the city under said contracts to pay the contractors, or cause the lot-owners to pay for the paving, on the paving accounts (which were a special assessment) and that in the collection of such accounts said city requested T. E. Brown & Co. to retain counsel to assist the City Attorney, which they did, and advanced to such counsel $10,000, as their reasonable charges; that said city further requested T. E. Brown & Co. to employ collectors and collect by all possible means, without suit. a large sum to wit, $250,000 of such accounts, payment of which had been refused within the ten days after the maturity of the same; that said Brown & Co. employed collectors, and performed such service at great expense, whereof the reasonable value was $25,000.

5TH. That the city has outstanding over $3,000,000 of bonds, upon which it is unable to pay the interest, and has no money or property unencumbered subject to its debts, and is insolvent;

wherefore defendants ask an accounting of all the matters arising out of said contracts, and alleged in the answer, with the accounting prayed by the city, and a decree for the sum due.

Defendants filed a CROSS-BILL, also embracing the matter in the latter five subdivisions of the answer, and prayed a discovery from the books of the city, and for a set off.

An amendment to this cross-bill, made pursuant to an order of the Court upon the motion of the city to consolidate the law case then pending by *Brown vs. The City*, charged:

That said city agreed to pay for *all* the paving done under both said contracts, by its covenants therein; that there is due and unpaid for paving done opposite the lots of private owners, at the prices agreed in said contracts, a large sum to wit, $500,000, which said city has neglected and refused to pay.

GENERAL STATEMENT OF ACCT. BY T. E. BROWN & Co.

The City of Memphis, (Cash Contract,)		*Dr.*
To paving intersections and opp. public property,		$87,769.68
" " extra, ordered and allowed by city,		7,727.80
		$94,497.48
	Cr.	
By $39,000 scrip sold per agreement, -	$17,322.50	
" Bills payable, - - - -	22,520.96	
" accepted draft to 1st Nat. Bank, -	5,000.00	
" $12,000 Bonds at 60c., - - -	7,200.00	
" Royalty collected, - - - -	9,831.08	
" $1,000 scrip at ~~60~~c., 50 - - - -	500.00	
" 55,335.83 Bonds, at ~~62~~c., 52 - -	28,784.11	
		$91,148.65
		$3,348.83

The City of Memphis (on general account)		Dr.
To paving streets, per contract, bal. due,	$500.000	
" extra grading, by change of grade, -	1,500	
" loss by suspensions of work, - -	4,500	
" cash paid by request, Atty's fees -	10,000	
" cost of collct'g paving accts. per request,	25,000	
" loss & damage by refusal to secure bonds	143.703	
		$684.703.00
	Cr.	
By $229,000 Bonds, at 50c., - -	$114,500	
" Royalty collected, - - - - -	8,424.50	$122,924.50
Balance due Brown & Co., - - -		$565,127.33

ANSWER OF CITY TO CROSS-BILL.

The city admits the contracts as charged in the Cross-Bill, and the transfer as alleged, to Brown & Co, and the performance thereof by them, and the acceptance of the work by the city, but denies every other charge of the cross-bill. It avers the delivery of $175,000 in Bonds, or other agreed equivalent, on the 2d loan; and that the lot owners have not been discharged of liability incurred under said contracts. It avers that all the contracts set forth, and acts and agreements charged in the cross-bill, were unauthorized by the Legislative power of the city; and were *ultra vires* the city itself and void.

The Replication of defendant to the answer of the city to the cross-bill, is general.

The City made no reply to the answer of defendants to its original bill.

Preliminary to the discussion of the questions in dispute here, it is worthy of observation that although the payment of the debt due defendants, now a half million of dollars, has been disputed for five years, and these contracts and the conduct of the contractors, subjected to official and judicial examination through four years, yet there has never been a hint towards a suggestion of any irregularity or fraud in the contrats themselves or in the conduct of the contractors, nor of any defect however slight, in the work done under them: on the contrary the city expressly admits the due performance of the contracts, and its entire approval and acceptance of the work after a continuous and rigid inspection of it. (p. 124.)

Nor is there any serious dispute about the facts involved. Upon two items only in the account stated by the Master, is there any disagreement in the evidence.

The material questions therefore before this court, are of law, and may be thus epitomized: How far will a municipal corporation be accounted irresponsible for its acts and contracts by a court of justice.

The Bill prays for an account, and charges four grounds of indebtedness:

1st. That the city under the *first* contracts was bound to pay for such pavement only as was laid at the intersections of streets, and opposite public grounds, and for all other work the contractors were to look solely to the private lot owners under special assessments made by the city; and that on account of the work for which it was thus liable, the city had overpaid the contractors a large sum, which it now claims.

2d. That on account of work done under the *second* class

of contracts (payable in the bonds of the city), the city also largely overpaid the contractors.

3d. That it loaned 275 of its 30-year bonds of the nominal value of $1,000 each, to the contractors, which they have not returned to the city as they agreed to.

4th. That a delay beyond the contract time occurred near the close of the contracts. in completing the work, whereby the city was damnified by having to pay additional "royalty" for the Nicolson Patent, which damage it claims of defendant.

The principal relief prayed by the City is based upon the legal proposition that the city is not liable under its contracts for the paving done, *opposite the lots of individual owners.*

This question, lying at the threshold of her case, will be first considered, while all the other claims presented by the bill, relating to the several *amounts* to be credited to her in the accounting prayed, will be considered in connection with the claims of defendants, in the same accounting, and will be argued under the exceptions to the Master's Report.

I. The City is liable on the Contracts set out in the Bill for all the work done thereunder.

The following is the legislative power given to cities. The General Incorporation act of the State declares that cities organized thereunder, shall have full power to provide for the paving of streets, alleys and sidewalks." 1 *Thomp and Stigers. Tenn. Stats*, (1871), § 1359.

The charter of Memphis declares "The Board of Mayor and Aldermen shall have power to improve, preserve and keep in good repair the streets, sidewalks, public landings and squares of

the City," act of Feb. 13, 1859—(Br. Dig. 112 & 208.) Re-enacted from act of Dec. 3, 1849.

The same act also provides (Br. D. 120,) that the City may require lot owners to improve the streets fronting their lots, and declares that "should any owner fail to comply with any ordinance requiring him to repair, grade and pave the same, the Mayor and Aldermen may contract with some suitable person for repairing, grading and paving the same *and pay therefor*," and collect the cost of the lot owner.

The act of Nov. 24, 1866, (Br. D. 145, 214) provides: "The Board of Mayor and Aldermen shall have power to require that the cost of grading and paving of any street shall be born by the owners of the adjoining property." It also provides that "They shall have and exercise complete and perfect control over all the streets."

The city passed an ordinance, providing "that the following "named streets, to wit, Main, &c., shall be paved with what is "known as Nicolson pavement, and that the Mayor is hereby "directed to advertise for 20 days in the city papers for proposals "for grading, rounding and paving the whole or part thereof, ac- "cording to the plans and specifications in the engineer's office, "and the Mayor and Finance Committee of the Board of Alder- "men *are hereby* authorized to make and enter into such con- "tracts with the lowest responsible bidder as to payments, time "of completion and under such restrictions as they may think "best." (Rec. 99.)

And a resolution, "That the property owners fronting on "the following streets in the city to wit, Main, &c., that they "pave said streets from the sidewalk to the center, on each of "said streets with the Nicolson pavement according to the speci- "fications in the engineer's office, by the 15th day of August,

"1867, and in default the city will do the same at their cost." (Rec. 115.)

Also an ordinance to the same effect. (Rec. 116.

The contracts under these powers first set out in the bill, were made and signed by the city as the first party, and by the contractors as the second party thereto. After detailing the duties of the contractors as to labor and materials therefor, the city, "party of the first part, *agree to pay* OR *cause to be paid* to the "parties of the second part," the price named, "upon the fol- "lowing terms of payment: Upon the completion of each section "the contractor shall receive from the owners of lots fronting "upon said section, one-half of the price of the same in cash, "the remaining half to be paid by said owners in 30, 60 and 90 "days, they giving their notes for the same with the lien fixed "by the charter retained in the notes. The City of Memphis will, "and does hereby guarantee to the contractors the payment of "said accounts as so assessed against the property owners."

The city levied special assessments per front foot on the adjoining lots sufficient to pay the contract price for paving opposite them, and it was undoubtedly the expectation of both the city and contractors that the lot owners would pay the assessments to the City or contractors, as the record shows (p. 108), many citizens had petitioned to have the work done. About half such assessments were in fact paid,—collected by the contractors at the request of the City; but with a local and increasing monetary stringency in 1868, collections almost ceased, and assured of the completions of the pavements by the presence of materials therefor, and the advance condition of the work, combinations were formed to dispute, in court, the constitutionality of the assessments, which culminated in the Supreme Court of Term, in 1872, in a decree declaring the assessments unconstitutional.

The charter gives the City the following power specially: "The "Board of Mayor and Aldermen shall have power to issue time "bonds * * payable in such City of the United States, as "in the discretion of said Board will enable them to be "negotiated on the best terms * * 2d to an amount not ex- "ceeding $500,000 for the construction and pavement of the "principal streets, &c., of said City." Act of Feb. 1, 1860, Brid. Dig. 132.

"They shall have power for the purpose of making *any* "*public* improvement, * * to issue the bonds of the City "bearing interest not exceeding 8 per ct. and having not more than "30 years to run." Act of Nov 24, 1866, Br. Dig. 142 and 223.

Hereunder the City passed an ordinance providing, "Sec. 1, "That there shall be issued city bonds with interest coupons "attached to the amount of $900,000, for the purpose of paving "the streets and alleys of the City and which shall be denomin- "ated paving bonds." (Sec. 110.)

Under this authority the City executed the *second* class of contracts set out in the bill.

These contracts after like details of the work, provide for payment as follows: "upon the completion of each section, the "contractor *shall receive* from the City the *whole amount due* "under the conditions of this contract for said section, the same "to be *paid* in Memphis City paving bonds, payable in 5, 10 and "15 years in equal proportions with six per ct. coupons attached, "payable semi-annually, Principal and interest guarranteed and "provided for by a sinking fund set aside for that purpose, Bonds to be taken at par."

The city does not question the validity of the *second* class of contracts, wherein the work is payable in bonds, nor its power to make the *first* class, so far as to bind it to pay for paving at

the intersections of streets and alleys, but denies the contracts bind the city to pay for paving opposite private lots, and denies the power to make such a contract. The opinion of the learned Circuit Judge demonstrates both the power and liability so clearly that I will add only a brief mention of cases, far stronger in facts for the cities than this for the plaintiff.

Kearney vs. the City of Covington, 1 Met. (Ky) 339. The contract for street paving provided the contractors should look to the lot owners for their pay. The city charter provided it should have power, by a two-thirds vote to pay for street grading out of the city treasury. The special assessments were invalid. It was objected that the city had not bound itself, and had no power to bind itself to improve the streets at the cost of the city.

The Court says "the City Council of Covington has the "power *incident to all such corporations*, to improve the streets "at the cost of the city * * the general law requires them "not only to put, but keep the streets in good repair * * a "construction cannot be put to it (the section of the charter re- "ferred to) to conflict with this general law. * The plaintiff "was employed by the city council to do the work for the city "under an agreement that he should be paid for it when com- "pleted by a tax on the lot owners * the city is liable for the "violation of her *implied* undertaking that the work should be "paid for by the lot owners."

In the case at bar the agreement is, by the City itself, to pay for the work "*or*"—an alternative privilege—to "cause to be paid" by the lot owners—an *express* undertaking, instead of the *implied* one in the case cited.

In *Baldwin vs. City of Oswego*, 2 Keyes (N.Y.) 141, the river was part of the highway and the City was empowered to deepen it, and by another section empowered to deepen it and assess the cost to adjoining lot owners. Plaintiff did the work under a con-

tract with the City. The special assessments were made but were void for irregularity. Porter, J. says, "It was competent for the common council of Oswego to make a contract with plaintiff for this city improvement. Having made the contract * * * the City is liable on the contract, and if the Common Council omit or neglect their duty in this regard (as to special assessments), the City becomes liable also for this reason, and the laborer and *contractor in the case of an absolute contract is bound to look no further than his contract.*"

In *Sleeper vs. City of Leavenworth*, et al., 6 Kansas, 307, plaintiff graded a street under a contract with the City to be paid by special assessments on lot owners, and brought this suit in equity against both the City and lot owners. The latter were discharged for invalidity in the assessment proceedings, and the city held liable, the court saying, "after the contract has been executed on the part of the contractors and the grading all done, the City is estopped from denying the validity of the contract or its liability to the contractors for the grading."

In *City of Louisville vs. Hyatt*, 5 B. Mon. 199, the contract provided the work should be paid for by the lot owners, and there was no express obligation by the City. The special assessments were held illegal, and the City was held liable, the court concluding in the following language, "The work was done on the "request of the city under a contract with her agents made in "pursuance of an ordinance competent to bind her, though not "sufficient to bind the lot owners."

In *Cummings vs. Mayor &c. of Brooklyn*, 11, Paige 596, the city contracted with plaintiff to grade a street at a price fixed, "*to be paid when the special assessment therefor are collected.*" A small part only of the assessments were collected and this suit was for the balance. It was contended that the city had no power to contract for this work, and bind the general treasury of the

city therefor. The Chancellor held the city liable, saying: "The "appellants having the *general powers* of a corporation, were "competent to enter into a general contract with the complain- "ants to grade the avenue and to pay them for so doing * * "the assessment of the expense, as a local tax, is not however a "restriction upon the powers of the corporation, so as to re- "quire it to contract only for payments out of that particular "fund."

In *Wetmore vs. Campbell*, 2 Sand. 342, the Street Com'r of N. Y. for the city, contracted for the building of a sewer by a day and for a price fixed, *the contractor not to be entitled to demand any pay till the money should be collected* on special assessments. The work was done, *then* its cost assessed, and on objection to the assessment, the court says (347), "They may pursue either "of two courses: 1st have an estimate, assessment and collection "of the expense and *then* proceed with the work. 2d, *execute* "*the work at their own expense*, and then assess the actual cost "on the lots." They hold the 2d mode as pursued, a legal one and say: "The corporate liability to pay the contract price was "in this case incurred to the contractor. He had no claim or de- "mand against any other person, natural or artificial. * * The "Statute *does not restrict* the corporation to any particular mode "or form of liability."

This doctrine is approved in *Maurice vs. New York City*, 4 Seld. (8 New York) 130. These cases with *Brewster, vs. Syracuse*, 19 N. Y., 118, *Argentine vs. San Francisco*, 16 Cal., 262. *City of Carondelet vs. Picot*, 38 Mo., 131. *Bigelow vs. Perth Amboy*, 4 Dutch, 97, *The People vs. Cairo*, 50 Ill., 154. *Beard vs. Brooklyn*, 31 Barb., 142, confirm the doctrine that the City is liable where she is the contracting party, although the contract shows that a special fund created or to be raised, was that from which alone the parties contemplated the work would be paid for, and in many of the cases, to which solely the contractor agreed to look.

In the case at bar the covenant of the City is itself *to pay* for the work. It has the alternative privilege *of causing* the lot owners to pay in a prescribed way, and if it succeed in *causing them* thus to pay, she *guarantees* the prompt payment by such lot owners at the times fixed by the contract or their notes. All of these covenants are broken.

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II.

We will consider the other questions in the case under the exceptions of the City to the Master's report; and the first one is to the *amount* charged to defendants for failing to return 240 borrowed bonds. The unquestioned facts respecting such bonds are: In Aug., 1868, there was due defendants $500,000; if the city paid this, it would stop voluntary payments by lot owners. Defendants needed money to pay their debts. From policy, instead of paying, the City *loaned* them 100 of its $1,000 thirty-year bonds, wherefrom to raise money to pay their bills, and to be returned in 18 months with interest, the city meantime paying defts. by the collection of the assessments, to enable them to purchase and return such amount of bonds. In November following, a further loan of 175 of like bonds was agreed upon for a like purpose, in like time, but at this time, the city insisted upon a conditional release from her liability for the paving; such release to be inoperative, if the ~~Supreme~~ Court of ~~Tennessee~~ last resort should hold the lot owners were not liable on the special assessments. (Rec. 344, 352, 295 to 302.) Much was claimed, below, under this release, but as only 140 of the 175 bonds were ever delivered, the court below refused it any effect. The reasons and decisions given in the opinion of Judge Emmons, render argument unnecessary, were the point still material. But since then the Supreme Court of Tenn. (June, 1872) has determined the question, holding the special assessments void, and the law authorizing them unconstitutional. I assume therefore that the appellant will claim nothing here for such release.

The defendants, as mutually contemplated, immediately sold the borrowed bonds, or paid them out at their market value, to satisfy their debts. Since then the city has never collected or paid over a dollar of its special assessments, (Rec. 310) nor have

the defendants been able to collect but about $8,000 from lot owners (Rec. 310 and 62). Thus unprovided with means by the city, they have been utterly unable to purchase and return the $240,000 of borrowed city bonds. As no decree can pass for their specific return, the only question is, at what sum shall they be charged to the defendants in this accounting.

II. The Master rightly charged the defendants with the market value and not the nominal value of the City's thirty-year negotiable coupon bonds loaned by it to defendants and not yet returned.

In considering this proposition, the preceding facts concerning the relations and obligations of the parties, the circumstances and purpose of the loan, together with the following facts relating to the city's bonds, *are most material.*

At the time of the loan, over $600.000 of this issue of bonds were in the market. Many of these had been sold by the city itself at their market value. They were substantially like all prior issues of city bonds, of which there were nearly three millions in the market, and all were the constant subject of purchase and sale, and of daily quotation in the commercial and market reports of the newspapers, and their value then and ever since has varied but little from 50 cents on the dollar. (Rec. 177, 178, 200, 252–3, 257, 341, 347, 352.)

Mr. Sedgwick (p. 28) says: "The declared object (of the law) is to give *compensation* to the party injured for the actual loss sustained."

Mr. Parsons says the proper rule of damages is, "a compensation which shall put the injured party in the same position in

which he would have stood had he not been injured." (3 Contr. 155.)

Judge Johnson says, "a complete indemnity requires that the vendee shall receive that sum which, with the price he had agreed to pay, would enable him to buy the article which the vendor had failed to deliver." *Dana vs. Fuller*, 2 Kern. 48. And if he has advanced the price, such sum as will enable him to purchase the article in the market.

In *Griffith vs. Burden*, 35 Iowa s. c. 6 West. Jur. 467, a suit for the conversion of a Minnesota State Bond, Cole, J., says: "Another rule equally well grounded and more frequently applied is, that the damages ought to be such as would compensate the party for his loss, In this case the plaintiff has lost his bond. *Another like bond of precisely equal value to the plaintiff* can be purchased in the market for the amount of the verdict in this case—the market value. Hence the verdict compensates him for his loss, and is the precise measure of his damages."

These are but expressions of a rule familiar as the alphabet to Bench and Bar. Were these the bonds of any other city, no more than their market value would be claimed. But being its own paper, it is claimed, excepts it from the rule; or, it being liable to pay the face of the bonds at their maturity, the damage to the city is special, and is the face of the bonds. But the reasons and the cases given, neither except these bonds from the rule nor show any special damage. No *fact* is charged or proven supporting special damage. If the city is specially damaged it is because as a legal proposition it *must* be, because the bonds are its own obligations to pay money which it is legally bound sometime to pay in full, and is therefore an exception to the rule that the *market value* is the measure of damages. But the cases cited relating to the notes of private individuals, not only do not warrant the inference of the city's counsel, but negative it.

In *Decker vs. Matthews*, 2 Kern. (12 N. Y.) 319, where defendant had wrongfully converted the plaintiff's own note, Marvin, J. says: "The measure of damages was *the amount which the plaintiff had been injured* by the wrongful act of the defendant. The note was transferred to a *bona fide* holder, and the plaintiff is liable upon it. The presumption is he has paid it or will pay it voluntarily, or that he will be compelled to pay it."

The cause of such damage is the *fact* that individual notes are not purchasable in the market.

In *Wheeler vs. Newbold*, 5 Duer, 37, where notes of individuals were *sold* by the pledgee, and it was held unjustifiable, it is said, "as the personal obligations of private individuals, with rare exceptions, can have *no market value*, it is certain that a sale, whether public or private, before they reach their maturity, will involve a large sacrifice of their true value, and entail a heavy loss upon the unfortunate debtor," and therefore no authority to sell, can be implied by the pledge.

Brown vs. Ward, 3 Duer, 660, where railroad bonds were pledged as collateral, was before the Court at the same time, and the right to sell was held implied by the pledge. Distinguishing this, from the preceding case, the Court says: "It would be most injurious in a mercantile community, where commercial credit is of so delicate a character, to allow the notes of a party to be exposed to sale before their maturity. But the stocks of a Company like those of a government *are the subjects of transfer and sale*, without the possibility of such an objection attaching."

And in *Griffith vs. Burden*, *ante*, it is said, "If such testimony (of market value of private notes) could be received it is hardly possible that the individual notes or bills of one person should acquire such extended circulation as to gain a market value * * such individual securities are very different in

their origin character and purpose from municipal and corporate bonds. This class of securities are made and issued for the express purpose of raising money *by their sale.* They cannot accomplish the purpose of their execution and issue except by being sold; they cannot be sold without establishing their market value."

But the books are not without examples of *market value*, applied as a rule of damages for the litigant's own paper. In *Brightman vs. Reeve's Ex'rs*, 21 Texas, 70, Brightman had wrongfully gotten possession of his own note which belonged to Reeves, and in this suit for its possession, damages had been given for its face, but the court here says, among other reasons: "In addition to *its not being due for some time* * * it was shown that the best paper in the country was at a large discount. The damages should have been assessed *with reference to the value of the note in the market and not by its face.*"

Where the private notes of other parties have been converted the rule is generally laid down that "insolvency of the makers, etc." may be shown to reduce the damages below the face of the notes. But authority exists for taking the *opinions* of witnesses of the value of such notes. See dissenting opinion of Judge Sheldon (with whom Ingraham, J., agreed) in *Potter vs. Merchants' Bank*, 28 N. Y. 657. But we do not invoke these cases; but only the broad, clearly defined and equitable rule, to which this case will be seen to be no exception.

In *Tracy vs. Talmadge*, 14 N. Y. 162, the North American Trust and Banking Co. bought of the State of Indiana through its agents, the Morris Canal and Banking Co., $1,000,000 Indiana State bonds at *par*, paying 98 per cent. in its certificates of deposit due at a future day. These certificates were not paid. The Trust Co. failing, its affairs were put in liquidation by this suit in equity and a receiver appointed. The State of Indiana made claim in this suit for the amount of the unpaid certificates,

$175,000, which had been given in part payment for the bonds, and a decree was rendered below in her favor for the *amount* of the certificates. The Court, by Selden, J., held the sale of the bonds for certificates void, as the issue of such certificates was unauthorized by the charter of the Trust Co., and decreed in favor of the State of Indiana, against the Trust Co. as for a conversion of its bonds (p. 191), "*not* the specific balance due upon the certificates, nor the price agreed to be paid for the stocks (which was par) *but so much as the stocks* (State bonds) *transferred were reasonably worth*, at the time of the transfer, with interest, deducting therefrom whatever has been actually paid, in any form, by the Trust Company for the same."

It is familiar law that whenever the thing in controversy has a market value, that must be found; and if it have no market value, evidence of its intrinsic worth for use, or sales of similar things, is that on which judgments are predicated. Hence the "reasonable worth" to the State of Indiana of her own bonds was adjudged to be *not their par value*, but what she could buy and sell them for. Such is exactly true of the city here.

III. Where corporate bonds are authorized to be issued for the accomplishment of an improvement, by a law not restricting the mode of use, they are chattels vendible by the corporation.

The declaration that a party has no saleable property in his own promise to pay, was an exposition of the usury laws. Such a sale was judicially declared *per se*, a loan. Every class of securities, is a form of debt, and their sale, a sale of credit. The sale of credit in the form of a guaranty has never been challenged successfully.

Ketchum vs. Barber 4 Hill, 225, 235.

In *Perrine vs. Hotchkiss*, 58 Barb., 77, it is said to be settled law that credit may be *sold or loaned* at any agreed price. In the form also of letters of credit, and exchange it is a subject of commerce. And the sole ground on which its *sale* in the form of promissory notes of individuals or corporations, was ever attacked was that of usury. But these Corporate Bonds are everywhere distinguished as to their nature and the purpose of their issue, from ordinary promissory notes and bills, and no implication of a usurious *loan* arises from their *sale* by the corporation issuing them.

In New Jersey, in the important litigation on the bonds of the Morris Canal and Banking Co., found in 1 Stock. 667, and 1 Beas. 329, where the Company pledged its own bonds collateral to its promissory notes, and the pledgee sold them as chattels, the pledge and sale were upheld. In the former (p. 698) it is said: "such bonds are transferable not as instruments negotiable under the law of merchants as bills and notes are, but as instruments of a peculiar character, expressly designed to be passed from hand to hand, and by a common usage known to all, actually so transferred. * * They are generally issued for the express purpose of raising money by their sale." p. 700.

In the latter case (p. 329), speaking of the former case, the court say: "It rests upon the faith that such bonds are *expressly designed* to be thus circulated (by delivery) and to *be sold in the stock market like public securities, and that they are universally so used* * * A deposit (of *such* bonds) differs entirely from a deposit of ordinary bonds, mortgages, promissory notes, which, in the absence of an agreement to that effect, the creditor cannot expose to sale, because they have no market value, and it cannot be *presumed* it was the intention of the parties thus to deal with them."

In New York, in the voluminous cases growing out of the business and failure of the North Amer. Trust and Banking Co.,

found in *Curtis vs. Leavitt*, 17 Barb. 311, s. c. 15 N. Y. 1–296, *Leavitt vs. DeLauney*, 4 Comst. 364, *Tracey vs. Talmage*, 18 Barb. 456, s. c., 14 N. Y. 162, it appears the Trust Co, issued one million five year bonds, and a half million seven year bonds. It *sold* some and *pledged* others of these bonds to secure its shorter time drafts and certificates (15 N. Y. 23). It had no direct charter power to sell or pledge its bonds. Comstock, J. says, p. 66, "Corporations of any kind have the incidental power to contract debts and issue their written engagements therefor in any form not prohibited." The sales of its bonds below par, and their pledge as collateral, were attacked as essentially usurious transactions. But the whole discussion and decision proceeds, *not* on the question of their being, or not, saleable chattels *in their nature*, but whether prohibited by the usury laws; and the Court holds that whether regarded as New York or English contracts, the recent statutes withdrew them from the operation of the usury laws, and the disposition made of them was valid. (15 N.Y., 84–89.) Selden, J., alone dissented, adhering to his position substantially, in *Schemerhorn vs. Talman*, 14 N. Y. 115, that a *sale* by the maker of his promise to pay was a logical absurdity, and must be a loan—a doctrine directly denied by Denio, J., in the same case, p. 137, and by *Leavitt vs. DeLauney*, 4 Comst. 364, where the DeLauny's drafts drawn in America, on themselves in Europe, are declared a thing of commerce, saleable or loanable at any price agreed upon, wherein Gardner, J., says, "The question is, whether upon a *sale of credit* made in good faith, the vendor can reserve, &c. This question was substantially decided in the affirmative in the Dry Dock Bank. (3 Comst. 344.)"

In *Bank of Ashland vs. Jones*, 16 Ohio St. 145–155, where the Railroad Co. had sold its own bonds at a greater discount than legal interest under a law authorizing such sale, the Court held, aside from the usury law, "Contracts for money stand on the same footing as contracts for any other species of property,"

and that "the bonds were vendible securities while in the possession of the Company issuing them."

In Indiana, *Co. Com'rs vs. Bright*, 18 Ind. 96, speaking of county bonds issued to Railroads, the Court says: "They are issued as marketable securities. They are for the purpose of raising money by transfer in the monetary world."

In *Eaton & H. R. R. Co. vs, Hunt*, 20 Ind. 457–467, where Railroad bonds were issued by one railroad and indorsed by the plaintiff railroad, and put in circulation, and afterwards, before maturity, in the course of business, came into the hands of the maker, and were again passed to the plaintiff, and by it re-issued and passed into defendant's hands, they were held valid. That is, the purchase of their own bonds by both maker and indorser, was no liquidation of a debt and exhaustion of the functions of the paper. The corporations could buy and sell their own bonds.

In Iowa, *Clark vs. Des Moines*, 19 Iowa, 213, Dillon, J., distinguishing warrants from bonds, says of the latter, "This class of securities are made and issued for the express purpose of raising money by their sale. And in *Griffith vs. Burden*, 35 Iowa, *ante*, Cole, J., says: "whether the power to issue the bonds is derived from authority to borrow money, 'to negotiate a loan,' 'to fund indebtedness,' 'to contract debt and issue bonds therefor.' 'to issue and sell its bonds, not exceeding,' &c., or generally to do any act or accomplish any work requiring, or which may properly be effectuated by the issuance of bonds, the *power to sell the bonds in the market directly by the officers or agents of the municipality or corporation issuing them, is well established.* The authority to sell the bonds in the market is an incident attendant upon, and growing out of the power to issue them. The character of a chattel attaches to them under such circumstances and the title passes as effectually as if they were chattels sold in the market at their market value."

In Wisconsin, *Hasbrouck vs. Milwaukee*, 21 Wis. 217, 237, Plaintiff did work on the City Harbor under a written contract by which the city was to pay in its bonds *par*, which contract was much changed by parol thereafter, one of which changes, plaintiff alleged, was, that he should receive pay in the bonds at their MARKET value. The court say "The question whether, after the change of plan, the work proceeded upon a cash basis and upon the understanding that the plaintiff was to receive the city bonds at their *cash value only*, was properly left to the jury." The jury, under directions, found for plaintiff the difference betwen the *par*, and the *market* value of the city's bonds: and judgment thereon, is affirmed. Considered as the prommissory notes of a private individual—evidence of indebtedness *merely* —a verdict for such difference could not be approved. It was because the City had created a market value for her bonds by issuing them, and treated them as chattels,—as a "depreciated currency"—in the act of issuing and vending these that she was adjudged to pay a difference of $100,000, although her obligations in such bonds, were outstanding for the full amount of the contract price for the work done.

In *Sedbury vs Supts. Chatham County*, 66 N. C., 486, the County for return to mandamus to levy a tax to pay plaintiffs' judgment, stated, the legislature had repealed the law authorizing the tax, and authorized the *issue* of bonds to *fund* its debts. The language of the act is: "are hereby authorized to issue coupon bonds * to fund such liabilities of the county as are outstanding." The plaintiff disputed the validity of this law, as destroying his remedy, leaving no alternative but to accept bonds for his debt, but the court says, "We are of opinion that the scope and effect of it is to empower the Board of com'rs of the County, to raise the amount to discharge the liabilities of the county outstanding, by issuing and *selling in the market* coupon bonds, and in this way funding the debts of the county."

In this court in *R. R. Co, vs. Bank of Ashland* 12 Wall. 226 the R. R. Co chartered in Ind., sold its bonds at a greater discount than lawful interest in Ohio, which were payable in N.Y. It charged the transaction void for usury: as a borrowing by the Co; as a *lending* by the Ohio purchaser, contrary to its charter and as usurious by the law of N. Y. The R. R. laws of Ohio and Indiana allowed companies to *sell* their bonds on such terms as they chose. It was claimed, the court says, that "in law, a party can not sell its own obligations to pay money. But it certainly may do this if authorized by law to do it," and "the question whether a negotiation of bonds was a *sale* or a *loan*, is ordinarily and *prima facie* a *question of fact.* To make it a question of law, some fact must be admitted or proved which is irreconciliable with one conclusion or the other."

In *Murray vs. Lardner*, 2 Wall., 122, this court declares the fact that corporate bonds "represent a large part of the wealth of the commercial world," and decides that there is no real distinction between them and bank notes, as things freely, passing in commerce.

The general doctrine of these cases is affirmed in—

City of Bridgeport vs. Housatonic R.R. Co., 15 *Conn.* 502.

Bulkly vs. Welch, 31 Conn., 342.

Maddox vs. Graham, 2 Met. (Ky.) 76.

Mechanics Bank vs. N. Y. & N. H. R.R. Co. 3 *Kern*, 625, where Comstock, J. specially approves the case of *Fisher vs. Morris Canal & Bank Co., ante.*

Craig vs. The City of Vicksburg, 31 *Miss.*, 252.

Cady vs. City of Watertown, 18 *Wis.*, 322.

Mills vs. Gleason, 11 *Wis.*, 488, and in many decisions in this Court found in 21 How., 545; do, 575; 1 Bl. 382; 2 do, 722; 1 Wall., 95, 175, 202, 257, 291, 391; 2 Wall., 110, 122; 3 Wall., 275, 327, 666; 7 Wall., 407.

Two cases have come to my notice when parties have been held to account for bonds at par.

County of Lawrence vs. *N. W. R. R.* Co., 32 Pa. St. 144. The County subscribed for R. R. stock, and issued its bonds therefor, but never received the stock. The R. R. Co. sold some of the bonds *at par*, and paid out others at 64 *per cent.* The law prohibited the sale of the bonds by the R. R. except at par. This suit is in equity to rescind the subscription, and for return of the bonds, or for their par value. The conduct of the R. R. was shown corrupt and fraudulent, and the court decreed the return of the unsold bonds, and judgment for the face of those sold, *payable in the bonds. No market value of the bonds was shown*, and the court rests its judgment on this reasoning: "The law makes it a part of the contract of the County with the Company that the bonds shall not be used unless the Company can obtain a hundred dollars of money or work for every hundred dollars of bonds. This was an essential condition of the contract. It was a gross and manifest fraud in the company thus to deal with the bonds of the County."

Aside from this special fraud, it will be remembered that the Courts of Pennsylvania deny to corporate bonds commercial characteristics, being an admitted exception to all other courts of America and England, as stated in 37 Pa. St. 553, *Diamond vs. Lawrence* Co., which was a suit on one of the bonds of the preceding case, sold at 64c., and which case is referred to by this court in 1 Wall., 95, *Mercer* Co. *vs. Hackett*, only to deny its authority.

In *N. O. Draining* Co. *vs. DeLazardi*, 2 La. Ann., 287, defendant was entrusted by plaintiff with the whole of its issue of bonds to negotiate. At first defendant sold some above par. Thereafter, with a fraudulent design to buy the bonds at less, defendants' themselves depressed the market value by false reports,

without which the Court declares it did not appear but the bonds would have been worth par in the market, as defendants had in fact sold some at above par; and judgment was given for the face of the bonds. The reasoning of the court implies that if the depression in the value of the bonds had not been caused by the fraudulent conduct of defendants, the market value alone would have been given, if they had such value.

I find but a single recent case opposing the proposition. *Town of Danville vs. Sutherlin*, 20 Gratt, 555. During the war, in its distress, the town issued its bonds and sold them at about 25 cents on the dollar in gold, and at about 210 cents, in Confederate notes, then worth 10 per cent. The only authority was, power "to contract loans and issue certificates of indebtedness therefor." The Court—three only of the five Judges sitting, and one of the three dissenting—held the bonds void for usury, and *arguendo* say the town could not sell its own promises to pay, on general principles. But Rives, J., in *Brummel vs. Hill*, 18 Gratt. 873, truly declares it is the usury law, with its settled construction by Courts, that is the "great cardinal principle *forbidding* the sale by the maker of his own note."

But cases questioning the power to sell, as forbidden by usury laws, have no application here, as the record presents no basis for the argument. Not only so, but it affirmatively puts the question out of the case. The Memphis City Bonds are payable in N. Y. (Rec. 198, 214), and as to such there is no usury law. *R. R. Co. vs. Bank*, 12 Wall., 229. Not only so, but the law of Tennessee in no case vitiates the contract for usury. Whether Tennessee or New York paper, its sale is not forbidden in any view by usury laws. These views are quite independent of the additional consideration, viz: that the charter expressly gave "power to issue time bonds having not over 30 years to run payabie in such city in the U. S. as *in the discretion of said Board*

will enable them to be negotiated on the best terms." Sec. 3, Act of Feb. 3, 1860, (Brig. Dig. 132).

The *mode* of use was optional with the City. In the *Canal Co, vs. Fisher*, 1 Stockt. 679, before cited, the Chancellor says, "The objection goes only to the *mode* and *manner* in which the directors and officers of the company disposed of the bonds in raising money for the purposes for which they were authorized to raise it upon their bonds. The stockholders did not prescribe the manner in which it should be done. They left the bonds in the hands of their directors and officers without any restrictions * and I think it must be considered that it was the intention of the stockholders to leave the matter to the discretion of the directors and officers."

This court, in *White Water V. Canal Co vs. Vallette*, 21 How. 425, where upon an estimate of the cash value of work to be done, the company contracted to and did pay double that sum in its own bonds—substantially thus paying out its bonds at 50 cts. on the dollar—the company contested the bonds as usurious says "There is "*full power*," (specially conferred,) 'to negotiate any loans that the company might deem expedient for carrying out any or all the objects of the act.' We should find great difficulty in deciding that the corporation was restrained by the laws concerning interest and usury in view of the comprehensive language (above given,) of the 18th sec. of the act. *Those laws rest upon consideration of policy applicable for the most part to individuals engaged in their ordinary business:* and the Legislature might well conclude that a *numerous body, engaged in a public enterprise*, under the directions of an intelligent board, *might be trusted with a plenary control of their property and credit* to accomplish the aim of the association. If the rights of the appellee depended alone upon the act of incorporation, it would be difficult to resist them."

Not only do the judgments of courts sustain the proposition of the vendible character of bonds in the hands of the corporation authorized to issue them and unrestricted as to the manner they shall be used to promote the object of the issue, but the legis-

lation of the whole contry confirms it. From the General Government down to the smallest corporate offspring, the laws authorize the issue, and sale or loan, or payment of bonds, sometimes with restrictions as to the price or mode of use, and sometimes without.

The American Law Review for Oct., 1872, page 82, remarks, in a note to the opinion in this case, that "constitutional and statutory regulations which now almost universally abound for the loan of the credit of States, counties and towns, and the long practice of the General Government in selling its bonds have so established commercial usage in the law, that the property characteristics of this class of credits is hardly longer open to reasonable question."

In the light of these decisions, as well as of common reason, were the question an original one, I submit, the proposition stated, under the facts attending the issue of these bonds, is correct. Therefrom it follows, that for the breach of any contract concerning such bonds, the same rules of law are applicable as to contracts concerning other personality.

The cases touching this proposition have been thus considered at length as, if affirmed, it substantially determines the next exception discussed which, with the exception under consideration, comprise the body of this litigation under the Master's Report.

Corporate shares, though wholly unlike corporate bonds in their origin, have property characteristics which render the decisions on contracts concerning them, analagous to bonds, and pertinent to the above proposition.

Shares, though expressed in monetary terms, represent by such terms but the relative proportions of the shareholders in the residuum of the corporate estate, at its dissolution, after the satisfaction of its bonds, and all other demands against it.

A distribution of such residuum is legally attainable only by its reduction to the medium expressed in the shares; and the shareholder may receive the sum expressed upon the face of the share, or more, or less. Hence, the ultimate expression of the share, as of the bond, is money.

Both are embraced in the term "securities." Alike at their origin both are designed to run a round of years, before the paper "security" shall expire, and the money they represent be thus realized.

Hence, to be presently available both must be, and are, alike the subjects of bargain and sale as "things in possession."

Courts have spoken of bonds as "a funded stock," and of shares as "evidence of a debt due from the corporation."

In the sense above explained only, do I claim legal exactness for such expressions.

The criticism that the bond, when offered for sale, represents neither money or property, as the corporation may have neither, is equally applicable to the share when it is offered for sale by the corporation; for in both cases the money or property represented by the paper is produced by the sale of the share or bond; and in neither case is the criticism quite correct, for both represent a property in the *credit* of the corporation, as saleable as a party's bill of exchange upon himself, and *so real* that constitutions and courts have declared it taxable.

Yet shares were once held to be such "incorporeal estate"—such a purely paper fiction of property—as to be neither the subject of purchase or sale by the corporation. But such is not now the law.

State Bank vs. Fox, 3 Blatch. c. c. 431.
City Bank of Commerce vs. Bruce, 17 N. Y. 507.
Taylor vs. Miami Ex. Co., 6 Ohio, 83.
Moore vs. H. R. R. R. Co., 12 Barb., 156.
Hart vs. Lauman, 29 Barb., 410.
Porter vs. B. & B. R. R. Co., 32 Me., 539.

And that corporations are liable on their contracts respecting their own shares, to the same measure as though the contract were respecting other property for—their market value,—whether above or below par, the following cases declare:

Allen vs. Ill. Cent. R. R. Co., 7 Bos., 515.
Hussy vs. The Bank, 10 Pick., 422,
Sargent vs. Franklin Ins. Co., 8 Pick., 99.
Building Ass'n vs. Sendnyer, 50 Pa. St., 67.
Taylor vs. Miami Co., 6 Ohio, 218.
State Bank of Ohio vs. Fox, 3 Blatch. C. C., 433.
City Bank of Columbus vs. Bruce, 17 N. Y., 507.
Cleveland vs. P. R. R. Co., 5 Ohio St., 180.
Pinkerton vs. M. & L. R. R., 42 N. H.
Otter vs. Breevort Pet. Co., 50 Barb., 247.

Whether municipal coupon bonds may be issued without *express* legislative authority, courts are divided on, though the numbers are decidedly in favor of the power. Not only is there this express power in this case, but in Tennessee it is the settled law that municipal corporations may without express power, even build a railroad in a foreign state, take stock in such a company, issue its bonds for the purpose or guarantee the bonds of a R. R. Co.

Nichol vs. *Mayor, &c. Nashville*, 9 Humph. 268.
Adams vs. *City of Memphis*, 2 Cold., 660.

But were the right of the city to contract respecting her bonds, as respecting bonds of another corporation, or other chattels, even a disputable power under her charter and the laws, yet having so done, she is concluded as to her rights and liabilities under the following proposition:

IV. A practical and continued construction of its powers under its charter, binds the city to the construction itself has adopted.

The Master found as a fact (p. 347), that "for a series of years past, the city has itself sold its bonds, scrip and notes in the market, and has treated them as vendible commodities." This was proven.

The City Treasurer—18 years a city official—(p. 197) testifies that as far back as 1856 the city sold $250,000 of its bonds at 52c. and in 1868, and since has sold some $2,000,000 at about 50c., (p. 199) thal from 1861 to 1865, "money was raised on city paper *heavily discounted*." "The mode of payment in 1866–7–8 was by a surrender of such an amount of city paper *as if sold at market rates*, could net so much cash," and "for some years prior the same practice obtained in a different way, viz, in the price of materials and work *enhanced* to meet a depressed city credit." "The city sold her *promissory notes* probably largely exceeding $50,000, *in the market*, at about thd same rates as city scrip—33 to 60c., (p. 200.) "It has dealt with its bonds, notes and warrants for ten years past, as negotiable paper, and the subject of purchase and sale at all times."

This evidence is not disputed. Examples of the mode of paying city scrip at its market value, are found in p. 319, of which the City Register testifies there are many, p. 313: and of borrow-

ing at 24 per cent., with scrip and bonds as collateral, $2 for $1, p. 320, 331, 328: and of the reissue of its bonds, p. 326: and of paying debts in bonds at their market value, p. 222; and of sale of scrip at discount, p. 333, 334. That the practice alleged was the universal rule of conduct, is shown as clearly by a resolution of the City Council *not* to use bonds as collateral except at par, and a *repeal* of that resolution in a very few days thereafter, p. 335.

Under these facts, in its dealing with the defendants, in its paper, as a "thing of commerce," it would be bound alike, by the sense of justice, as by the following decisions:

The Bank of Utica vs. Mercereau, 3 Barb., Chy. 576. On the question of a tax-deed conforming to the statute, the form having been long used, but now held void by the vice chancellor, the chancellor says, in reversing this decision:

"The maxim that custom is the best interpreter of the law, is applicable to this case."

McKeen vs. DeLancy's Lessees. 5 Cranch., 32. The Court held an acknowledgment bad under the statute, but upheld it because the Court below "reports to us that this construction was universally received."

Surott vs. Lapice. 8 How., 68. The construction of law, as given by the Commissioner of the Land Office, is upheld, the Court saying, "we shall feel ourselves restrained, unless the error was plainly manifest, from disturbing the practice, prescribed by the Com'r."

Briscoe vs. The Bank, 11 Pet., 317. Speaking of the power of States to authorize Banking, and whether prohibited by the Constitution of the U. S. from so doing, the Court says:

"A uniform course of action, involving the right to the exercise of an important power by the State governments for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised."

Clark vs. *Mowyer*, 5 Mich., 467. On a question whether the notice of a tax sale complied with the law, the Court says: "From the very date of the act it has received a different (from that claimed) practical construction in the Auditor General's office. * * This practical construction must have been known to the legislature. We cannot suppose them ignorant of what all other men knew, in reference to the public acts of one of the executive departments of the government."

In *Woodbridge* vs. *Ceaver Co.*, 3 Wal. Jr., it is held the bonds of a county will be held valid though issued under so doubtful authority that their issue would have been restrained by injunction.

Van Horstrup vs. *Madison City*, 1 Wall. 297, the court says: "our conclusion is the City had power to issue the bonds. Even if the case had been doubtful, inasmuch as the City authorities have given their construction to the charter and bonds have been issued and in the hands of bona fide purchasers for value we should have felt bound to acquiesce in it.

And in *Meyer* vs. *Muscatine*, 1 Wall., 391, "If the subject admitted of doubt we should hold that the City having acted upon its own construction, and drawn in others to take the securities and advance their money upon them, it is now concluded from denying that construction to be the true one."

Cooley on Const. Lim., 69.

Under the cases cited for the three preceding propositions, and under the facts of this case, far stronger against the City

than any in which the judgments cited were predicated, we may safely affirm that the non return of the City's bonds, is no exception to the general rule for estimating damages, and that no special or peculiar injury is shown, or is possible to the City.

A second rule for estimating damages is clearly defined in *Hadley vs. Baxendale* 9 Exch., 354, in the alternative clause of the following passage: "The damages which the party ought to receive * should be such as may fairly and reasonably be considered either arising naturally, i. e.. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

V. The reasonable supposition is that both parties contemplated that defendants should account for the bonds at their market value, if not returned.

The authorities already cited show that the issuance of such negotiable coupon bonds, with interest and principal payable at the chief commercial city of the Union, carries the presumption that they are issued for sale. To that presumption we here add the indisputable facts concerning this loan, viz: They were loaned to enable defendants to raise money to pay debts contracted in carrying on the work, and to carry it on. Rec. 264, 267, 300, 305. It was mutually expected the city would collect the assessments in eighteen months for defendants, out of which they could buy and return the borrowed bonds in kind. Rec. 267, [541]. The Mayor so represented, and his action was expressly approved by the Council. Rec. 305–6. It was well known that defendants could not sell them for more than 50c. on the dollar, for that was the very highest price, and the city about the same time sold

them herself at that price. Rec. 179. [308,] 198, [366,] 222, [395].

In the light of these facts, it is a business absurdity to suppose the defendants contemplated paying a bonus above legal interest, of 100 pr. ct. for the privilege of ~~following~~ borrowing from their debtor, or that the City anticipated so enormous a profit from a failure to return the bonds.

Such a sum as would enable the City to buy back this amount of bonds, would completely compensate the City for its breach, and such sum only can be reasonably presumed to have been in the minds of the parties and is allowed by the master.

III.

The next exception I will discuss is that to the allowance, by the master, of any compensation to defendants for the breach of the covenant of the city to secure the bonds it paid to the contractors, by a sinking fund; or as otherwise put by the master, for the difference between the cash value of the work done, and the cash value of the bonds paid on such work. Rec. 346, "Sixth," 354.

VI. The City is liable on its covenant with the contractors, to secure its own bonds, for a breach, resulting in substantial injury to them, such injury being the result that would follow the breach, in the ordinary conduct of such affairs, or its "natural result."

The covenant is to pay in six per cent. coupon paving bonds at par, running an average of ten years, "the principal and interest guaranteed and provided for by a sinking fund set aside for that purpose. Rec. 33. The breach is unquestioned. There is no pretense of a single act by the city for its observance.—Lofland, the then Mayor, testifies, p. 183: "The sinking fund was not provided, as mentioned in the notice. No interest was paid on the paving, or any other city bonds during my term of office." The notice referred to was for bids, and is the same as the contract, p. 187.

Bridges, the City Treasury, testifies that no fuud was ever provided for the paving bonds, and that such bonds were the same in price as all the other unsecured bonds of the city. p. 200.

Mitchell, the principal original contractor, testifies: "After the contracts were let and the work going on, the city paid no attention to its contracts and representations about the Sinking Fund: prepared no fund, and the paving bonds were in value like all the other Memphis bonds, worth from 45c. to 47c. on the dollar. * I remonstrated with the city authorities about the failure of the city to provide this security, but could get no satisfaction from the Mayor, or any one of them." p. 271–2.

We have seen that corporate bonds are issued for sale in the market, and that these Memphis city bonds were bought and sold by the City; that in all respects she was empowered to and did in fact treat them the same as though the bonds of another corporation in her hands. Hence it follows, she could stipulate to do any lawful thing that would add to their value, in the bargain, to sell or exchange them for labor or property, and a breach of the stipulation would subject her to the application of the general rules governing contracts.

Mr. Sedgwick but quotes law as old as the Year Books, p. 47. "Whenever the *breach of an agreement*, or the invasion of a right is established, the English law infers some damage to the plaintiff." If no proof of actual loss is given, nominal damages at least are adjudicated. "The breach of a contract, *or of a duty* arising *from a contract*, is sufficient to entitle a plaintiff to maintain his action," says Rappallo, J., in *Heineman vs. Heard*. 50 N. Y., 37. If actual injury is shown, the question then is, was it proximate to the breach.

For the breach of this covenant the City should account to defendants for the difference in value between the unsecured bonds, as delivered, and the same bonds secured agreeably to the contract.

This difference in value we prove by witnesses acquainted with the market value of such securities. Twenty-one witnesses,

of whom twelve are shown to be bankers and brokers accustomed to deal in all classes of securities and to have dealt largely in Memphis bonds, testify the city bonds, secured as contracted, would have been, and would now be worth in the market, fully 85c. on the dollar.

Thus: Mr. Lawrence, a Mew York banker testifies, p. 254, to a familiarity with the prices of Memphis bonds, from much dealing therein, and in answer to a question as to the class, or market quality of Memphis City Bonds secured as stated in the contract, and their value, says: "Bonds of the above description and thus secured, are considered as first-class. The price of such bonds would average from 80c. on the dollar to *par*, depending on the city issuing the same. Issued by Memphis, they would have been and would now be worth 85c. to 90c. on the dollar."

Mr. Barrett, a Broker of Memphis, and dealing in city bonds, in answer to a question as to the value at the time issued and since, of bonds described in the language of the contract, says, p. 179, "Had the Sinking Fund been provided for, they would have been worth from 85c. to 90c. on the dollar."

Mr. Cobb, a Cotton and Bond Broker of Memphis, in answer to a similar question, says, p. 387, "The bonds would be worth 85 cents, so secured by the Sinking Fund alluded to."

All the other witnesses testify substantially the same.

It is undisputed that the New York market controls, and the value in the Memphis market is a reflection of New York.

The seven witnesses called by the city on this question, all testify to a material difference in value between the bonds as delivered and as contracted. They put the value of the secured bonds at about 70c.

Thus: Mr. Farrington, the principal witness called by the

city, says; p. 392, if the Sinking Fund had been provided, "I think it would have added to their values, * * I do not think they would bring over 70c.;" while Mr. Garth, another witness called by the city, testifies on cross-examination, p. 393, "If I knew that the Sinking Fund was *established*, and its management in honest and responsible hands, and the money provided to meet principal and interest, I should say the bonds were worth nearly par, if not quite."

Mr. Levy a witness for the City, Rec. 397 [852], admits "there would be some difference" in favor of a sinking fund bond over a bond not so provided, *even though the interest on such other bond was promptly met.*

It was objected that these Bankers and Brokers were incompetent to speak of the value of a bond secured as the contract provided, because no such bonds *issued by the City of Memphis*, were ever in market. As well might we deny proof of the market value of a horse warranted sound, yet not so, because no *just such* horse *sound* was ever for sale. The rule is plain. On every breach of contract for described things, those acquainted with similar things and their values, testify their *opinions* of the value of the thing described. Thus, carpenters testify to the value of a house described but not seen. *McDonald vs. Chislin*, 42 Barb., 39. A nurseryman to the value of trees destroyed, though never seen. *Whitlock vs. N. Y. Cent. R. R.*, 36 Barb., 647. A carpenter of the cause of a building's fall. *Sorg vs. First Cong.*, &c., 63, Pa. St., 156. A witness who had seen a cow, what her value would have been if good and young; and her value if she gave but four quarts of milk a day. *Joy vs. Hopkins*, 5 Den., 84. A woman who had not seen, but heard described a feather bed and pillows, "what she would call them worth." *Harper vs. Leal*, 10 How. Pr. 277. A steam fitter to give his opinion of the sufficiency of the quality of the iron in an oil still. *Ardesco Oil Co. vs. Gilson*, 63 Pa. St., 151. A

Boston Merchant to testify to the value of sugar in a foreign port, from information by letters and purchasers by him, from such port. *Alphonso vs. U. S.*, 2 Story C. C., 426. Underwriters to testify their opinion of the materiality of representations made or suppressed in applications for policies, as in *Richard vs. Mardock*, 10 B. & C., 534, *Marshall vs. Union Ins. Co.*, 2 Wash. C. C., 357.

And as to corporate bonds, their "value can be proven by those acquainted with the market." *Buckly vs. Welsh*, 31 Conn. 342.

Bankers and Brokers are peculiarly qualified thus to testify concerning the value of marketable securities.

Judge Selden says in *Rochester & S. R.R. vs. Budlong*, 10 How. Pr. 291, "Upon all questions except those, the knowledge of which *is presumed to be alike common to all men* whatever may have been their trade or employment, the opinion of persons skilled in the particular subject to which the question relates, is admissible. *Every business or employment which has a particular class devoted to its pursuit*, is an art or trade within the meaning of the rule."

Surely the compensation awarded defendants was reached through legal evidence, even if there were no market value for the bonds, and if there were no Sinking Fund bonds of other corporations similar to these contracted for in the market, yet the defendants would not be remediless. The opinions of witnesses conversant with the conditions affecting the value of securities, would still be the best evidence adducible. Bonds may be valuable for investment that are not known in the market, and a safe bond, yielding promptly its interest may be negotiated at a price giving 10 per cent. to the investor, and at such rates, the proof shows, investments are made at Memphis. Rec. 397, [851] 392, [837,] 390, [853].

Simpkins vs. Low, 49 Barb., 382, 394, was an action for refusing to deliver San Francisco Water Co. Bonds. The defendant

bought them for plaintiff, but paid his own money. They were due at the date of this suit, and plaintiff was entitled to recover only nominal damages, unless they were worth more than par. The plaintiff offered to prove the bonds of that issue were being paid as presented, in gold, then (1864) at a premium—240 to 260. *The bonds were not in market* and had no market value, but a witness testified they were worth the value of gold. The Court below held that, as they had no market value, they could have no intrinsic value over the sum recoverable by suit; but this Court held otherwise, Ingraham, J., saying: "There was proof of their value if paid in gold. It is true that was the *opinion* of the witness merely, and not an actual sale; but where there are no actual sales of an article a witness may give his opinion of the value of such article."

Murray vs. Stanton 99 Mass., 345, the defendant paid plaintiff for goods, $3,000 (nominal) Ill. Southern R. R. Co bonds. Defendant then agreed to give plaintiff in the place of such bonds, $2,500 of said R. R. Co.'s bonds, *indorsed by the Ohio & Mississippi Railroad Co.* Defendant failed to deliver the latter bonds, and plaintiff sued therefor, tendering the bonds received back. Before trial, the bonds delivered plaintiff were stolen, and their loss was held to fall upon the plaintiff, and plaintiff recovered the difference in value between the indorsed and the unindorsed bonds. The Court says: "This action is for a breach of contract for an exchange of bonds. Upon a breach of this contract by the defendants, the plaintiff became entitled to recover his damages. By surrendering to the defendant the bonds held by him, or bringing them into court for them, the plaintiff might have entitled himself to recover the full value of the indorsed bonds. But he was not obliged to do this. After breach of the contract by the defendants, he might retain and dispose of the bonds held by him, without losing his right to recover for the breach. The measure of damages is the same as in the case for the exchange of any other kind of property to wit: the difference of value at the time of the breach * * Where there is a market value, it shows the price at which either party may have relief from the consequences of the default of the other,

and therefore it properly measures his damages." In that case the indorsed bonds had a market value, and the others none, and their real value was held provable "from such elements of value as are attainable," and evidence that they were secured by mortgage on the road bed "worth about the amount of the bonds," was held admissable."

In *Dyer* vs. *Rich*, 1 Metc. 180–192, on a contract for 10 shares in a manufacturing company, *to be* organized with 200 shares ($100,000) of paid up stock, where it was organized with but 70 shares, the plaintiff refused the shares and sued for their amount in money. Shaw, C. J., for the court on the measure of plaintiff's recovery says "the plaintiff is entitled to recover the value of the 10 shares had the full capital been paid in. The question for the jury is, what would have been the value of the ten shares, in such a capital stock, raised and appropriated to such a branch of manufacture, had it been made up at the time stipulated, and the Company ready to proceed in good faith to operate upon such capital pursuant to their charter. It might have been worth somewhat more or less than the par value: so much as it would have been worth in money,we think the plaintiff entitled to recover."

Such value could well be shown only by the opinions of witnesses based on far greater uncertainties than the evidence in the case at bar.

VII. The covenant of the City was, in substance, a warranty of the kind and value of the bonds paid defendants.

Thus in *Gibson vs. Stevens*, 8 How., 401, flour "guaranteed to inspect as superfine," and pork "guaranted to pass inspection, Taney, C. J. says: are "warrantys of the soundness and quality of the thing sold." Lord Abinger says in *Charter vs. Hopkins*, 4 Mees. and W., 404. "A warranty is an express or implied statement of something which the party undertakes shall be part of a contract, and though part of the contract, yet collateral to the express object of it."

Shelton vs. French, 33 Conn., 489. Debt on a bond conditional to deliver plaintiff a $1,000 Mobile & Ohio R. R. Co. bond, *payable in New York*, and to guarantee its payment. A bond was delivered as contracted, except it was *payable at Mobile*. It was therefore received and held as collateral only. The court below gave judgment for the face of the R. R. bond and interest, it having *matured before suit*, and therefor say, p. 496: "If the contract was legal, and one of guarantee as well as of sale, there was no good reason to prevent a recovery of damages in the action for breach of the guarantee, as well as the value of the bond. Beside the value of a Mobile bond to plaintiff was the value of such a bond guaranteed by defendant, and it was not for him to say it was not worth the face and interest to plaintiff, for it was of the essence of the agreement that he should make it so."

Literally applied, this and some other cases cited, would estop the city's disputing that the sinking fund bonds would not have been worth the face.

In *Struther* vs. *Clark*, 30 Pa. St. 210, defendant sold plaintiff stock, with "guaranty that said stock shall yield annually 6 per cent. dividends for three years," and he claimed he was to account for a sum sufficient to make up the amount of 6 per cent. for the three years only, but the conrt say: "It was a guaranty that the stock was of a quality to yield the specified dividend for three years. But it was not a stock of such a quality. The rule in such cases is the difference between the stock transferred, and *such* a stock as this was guarranteed to be."

So here the guaranty is not of the payment of interest and of principal, for the bond obliges that, and the guaranty would be meaningless, but of a bond of that class and quality, *so secured* as to guarantee its prompt payment.

In *Miller* vs. *Morrill*, 51 Me., 9, plaintiff advanced money to a Company of which he was President, on the assurance of defendants (directors) that they "would at the next meeting, cause provision to be made for his indemnity, so that he should be reimbursed, or adequately secured." At the next meeting the Directors did authorize plaintiff to sell at the best price he could get, some of the Company's bonds, to pay "present claims." He sold them at 70c., "their value," and paid out the money, and the Court held the obligation of defendants satisfied by thus putting bonds in his hands. The case is significant in this: (1) It is a contract by Directors, as individuals, to exercise their powers as corporate authorities; (2) and as such to secure a debt; (3) and that the agreement was performed by authorizing its President to sell its bonds below par, or for what they could bring. Yet, by a learned Court, and able counsel, with a record more suggestive than this, in neither point was it questioned—points, here professed, as in good faith made, whereby defendants for five years have been baffled of their rights in the Courts of justice.

Looking, therefore, at the contract *alone*, under the law of the land the loss the defendants are proven to have suffered, was that which naturally followed the breach.

We now proceed to discuss the same question illuminated by the circumstances attending the transaction. I do not mean peculiar or special damages suffered by defendants other than such as it is presumed any other person under the same contract, made under the same circumstances, would also suffer, but such as, under the circumstances, were presumably contemplated.

VIII. The City is liable on its covenant to secure its own bonds, for the difference in value, hereinbefore charged, as the damages "reasonably supposed to have been contemplated by the parties in case of a breach."

To determine the compensation due under this proposition, the court must put itself in the position of the parties at the time of contracting.

Mr. Greenleaf says (1 Greenl. Ev. § 287): "In the interpretation of wills and contracts, the object is the same, namely, to discover the intention. And to do this, the court may in either case *put themselves in the place of the party*, and then see how the terms of the instrument affect the property or subject matter. With this view evidence must be admissible, of all the circumstances surrounding the author of the instrument."

In *Adams Express Company* vs. *Egbert*, 36 Pa. St. 364, where the Company was held liable for neglect in carrying models to compete for a prize, in time, "for the value of the opportunity to compete for the premium," Justice Strong says: "The purpose of the contract was to secure to the plaintiff the privilege of competition. Certainly he must have had that in contemplation, *and if the Company were informed of the object of the transmission*, the loss of the privilege was in view of both parties." * * * Speaking generally he says: "Perhaps if the special circumstances under which the contract was made, and which occasioned *special* and *unusual* injury to attend its breach were *unknown* to the party which broke it, they could not be held to make compensation for more than the amount of injury which generally results from the breach of such contracts in cases unattended by any special circumstances."

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announcing the rule I have quoted, and which, it is said in 2d Smith's leading cases, 528, (6th Am. ed.), "appears now to have been recognized by all the common law courts," says: "If the special circumstances under which the contract was actually made were communicated by the plaintiffs to defendant, and thus known to both parties the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances, so known and communicated."

This leads us to a consideration of the circumstances under which the contract was made.

By the specifications for bids for the work, bidders were referred to the City Engineer for further information. Rec. 17. By an advertisement for bids, bidders were informed the bonds would be Sinking Fund guaranteed bonds. Rec. 187–8. By the City Engineer, bidders were advised the bonds would be a special issue, secured by a sinking fund, and *be made worth nearly par*; that the market value of the proposed bonds was discussed by contractors, and divers city officials, and the lowest estimate of market value was 85c., and the bids and contracts *were predicated on such representations.* Rec. 196.

By the terms of the agreement the contractors were to tako the bonds *at par*. This necessitated an estimate of the amount of paving that could be done for a dollar of the bonds.

The Mayor testifies "his object in recommending (See Rec. 106, 110) the creation of a Sinking Fund for these bonds was to make them worth as near par as possible; and that if it had been provided, as contemplated, the bonds would have sold for 85c. to 90c. on the dollar. Rec. 184, [324] "The matter was generally canvassed by myself and members of the Board of Aldermen, and the contractors." Rec. 185.

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In his message on the subject (Rec. 107–8), he says: "I believe contracts can be made for paving at reasonable rates, payable in bonds guaranteed as I propose, and if done the result will be highly advantageous to the city financially, and will accomplish more in restoring the credit of the city in three months, than can otherwise be done in a year."

Mitchell, (one of original contractors) p. 271, testifies: "The representations were that the bonds should be amply secured by a sinking fund, set aside for that purpose, collected in advance, and placed in the hands of three trustees. * We made our bids on the basis of 90 cents for the bonds. * * The contracts were made on the faith of such representations, made in public by the city officers as to the value and security of the bonds." The city refusing to secure the bonds, he says: "We negotiated a transfer of the contracts (to defendants). I did this because it was utterly impossible for me to go on with the work with the bonds not secured, and I could not have gone well after the change was made in the contracts for it brought the price much below my estimate on the value of the securod bonds."

The "change" alluded to was from payment in bonds at $5.25 per square (Rec. 33) to $4.37 in cash, Rec. 35, (i. e., the aggregate of paving, grading and remitted royalty.) As the city thus agreed the work was worth $4.37 cash for which she paid $5.25 in bonds, the estimated value of the bonds would be 83⅓c. This Mr. Mitchell testifies was "*much below*" his estimate of the secured bonds. In this he is corroborated by Mr. Taft, another bidder. Rec. 192.

After the bids were in, Hopper and Montgomery. who were men of limited means, and who put in these bids, addressed a letter to the City Council, (Rec. 113, 114) stating they had arranged with Mr. Mitchell and others for capital, and did not intend putting the bonds to be issued, in the market for sale, but to so

place them from time to time as not to depreciate the city's credit. But the violation of its agreement by the city. disabled them from perfecting the loans negotiated on a promised pledge of Sinking Fund bonds, and, as seen above, quite crippled the capitalist, Mitchell, on whom they relied.

At this time the common bonds of the city were worth scarcely 50 per cent. and these Paving Bonds *unsecured*, were substantially the same. Rec. 341.

In the light of these facts it is impossible to say that it was not in the contemplation of the parties, that a failure to keep its agreement would not be followed by a loss to the contractors of the difference between the price at which the secured bonds were mutually estimated, and that which the unsecured bonds were in fact worth.

IX. The City affirms that the covenant broken is one for the payment, or for security for the payment of money, merely, for which the debt and interest evidenced by the bonds, alone are recoverable.

This proposition is based on a false assumption of fact. It affirms that the contract was to do the work on a credit of ten years, and that the bonds were merely evidence of it, as a thirty-day note between merchants. But the contract provides: *they shall be paid as each section is completed, the whole amount due*, in Memphis City Paving Bonds. As is said in *Loring vs. Gurney* 5 Pick, 16, where goods were sold to be paid for by the purchaser's note due on demand with interest after six months, "The payment is *immediate*, though in a particular manner."

Mr. Sedgwick says damages for the non-payment of money, is the sum due, with legal interest, and under this rule the city

affirms the above propositton. The vice of the argument lies at its threshhold. The city did not agree to pay money, and this claim is not for money due under the contract.

What character of bonds were to be received in payment?

(1) They were to be coupon bonds, and,

(2) To bear 6 per cent, interest, and,

(3) Interest payable semi-annually, and,

(4) To be Sinking Fund Bonds, and this Sinking Fund was to be adequate to guarantee the prompt payment of the coupons as well as of the principal of the bonds.

A violation of either of these covenants, to the defendant's damage, would entitle them to compensation. "Sinking Fund" is no idle term, nor its repudiation mere bagatelle.

In *Ketchum vs. City of Buffalo*, 14 N. Y. 367, Selden, J., says, "A 'funded debt' therefore, was a debt for the payment of the principal or interest of which some fund was appropriated." and Wright, J., s. c. 578, says, "The benefits arising from a funded debt *differs materially* from the ordinary obligations of a state or corporation to pay money. A funded debt rests on some pledge of the public or corporate revenue or property which is set apart as a *fund* to keep down the interest and extinguish the principal. When the extinguishment of the debt, is contemplated, it is called a *sinking fund.* The funding system is resorted to for the improvement of public or corporate credit by giving creditors a *specific lien*, either upon revenues or property. It is in effect a mortgage."

In *English vs. Sup's. Sacremento*, 19 Cal. 173, speaking of a sinking fund provided in the law authorizing the issue of the bond, Field, C, J., says - "The collection and preservation of this fund gave value to the bonds as money securities and by a grad-

ual process of accumulation assured their ultimate payment * * The section providing for the sinking fund, therefore was a most important term in the arrangement, and it would not be an act of justice or good faith to refuse to give effect to it."

In *The People vs. Bond*, 10 Cal., 571, on enforcing the levy of a tax for a sinking fund under a law therefor, the court says, "San Francisco, though a municipal corporation, must and may as well be made to comply with her contracts as a private person. * We consider the act as substanstially a trust deed * of her revenues and property."

In this case no law accompanied the bonds providing for a fund, or any special tax therefor. The contract stands to defendants the same as the California law to the bondholders. Here the bondholder bought no right to a fund with the bonds. He only bought what he paid for, a depreciated, unsecured bond. The obligees in the contract alone suffered by its breach, and the importance of the *covenant* was the same to defendants, as the *provisions of the law*, in the cases above.

Suppose a city, or a R. R. Co. having in the market two classes of bonds, one secured and worth par, the other unsecured and worth 50 per cent., would not he be "a bold lawyer" who would affirm a contract for the first was substantially satisfied by the 2d, though the sum ultimately recoverable was identical? In not a whit does such a case differ in principle from this. Here the *mode* of security is left optional with the city, but it must be adequate to the "*guarantee* of the prompt payment of the interest and principal." It might be by a pledge of a part of the issue and taxation, or by the pledge of certain fixed resources, as wharfage dues, or by mortgage of its realty, as Memphis has in fact secured bonds.

Adams vs. Memphis, 2 Cold., 645.

The learned Circuit Judge (opp. 22), has critically and justly discussed the assumed theory that the breach was of a covenant to pay money, under *Rollin vs. Steward*, 14 C. B. 495, 78 Eng., C. L.; *Boyd vs. Till*, 14 Irish C. L. Rep., 43; *Margetti vs. Williams*, 1 B. &. A., 423, and, though not resting his decision on them, affirms their authority for it.

Since then, Her Majesty's Court in Australia, in *Hinchcliffe vs. Ballarat Bank* Co., (Australian Jurist. 1871), held the bankers in large damages over the check, for the refusal, *without bad faith*, to pay plaintiffs check, he having funds in bank.

But the exact point in issue here, arose in a still more recent case in England.

Prehn vs. Royal Bank of Liverpool, L. R. 5 Exch. 92—18 W. R., 463—21 L. T. N. S. 830, was a suit as stated by Martin, B. p. 99, on a "contract contained in two letters, and the result of those letters is, that the defendants are to accept and take up the plaintiff's drafts, and that the plaintiffs are to keep the defendants in cash to meet the bills. The plaintiffs had fully performed every part of their engagement * and the defendants broke their contract." The plaintiffs had a house abroad, and at Liverpool, and shipped grain to Liverpool, against which they wished to draw at three months, on defendants, the drafts to be accepted by defendants. and plaintiffs to put defendants in funds before their maturity, for their payment. Defendants accepted a draft for £4530, but notified plaiutiffs before due, they could not pay it, though having plaintiff's funds, and plaintiffs got other brokers to take up the draft at maturity, at an expense to him of about £550, for commissions and telegrams. For this sum, as damages for non-performance of defendants' agreement, this action is brought. The defendants claimed that as it was substantially but a contract to pay money, the amount of the draft with interest, was the measure of damages. Kelly, C. B. says:—

"But in the case before us, the action is not brought on the bill, but on a special contract, the incidents of which differ materially from those which belong to the contract constituted by becoming a party to a negotiable instrument, and which are strictly limited by the law merchant. The question is one of great importance." After refering to the preceeding cases as analagous, yet not in point, he proceeds: "We must decide the case, tnerefore, on the general principal of law; and no doubt, according to these principles, when parties have entered into a special contract, they are entitled, in case of its breach, to recover in respect to any damage reasonably flowing from its breach. We must, therefore, look at the contract and the circumstances to see whether the damage in respect to which plaintiff's sue, was according to the principle of *Hadley vs. Bexendale*, within the contemplation of the parties." He then discusses the course of mercantile affairs, the probable injury to the drawers by the non-payment of their draft, their prudential efforts to lessen their injury by hiring others to pay it, a course presumably necessary from the disappointment of defendants, and concludes: "The plaintiffs are therefore, *at least* entitled to recover the money they have necessarily paid to prevent the further loss, and to recover it as *general damage*."

Here, as there. the action is not on the commercial paper —the bond,—but on the *special contract*, to provide for that paper; and the case at bar has all the added strength of the chattels characteristics of corporate bonds over drafts, established by usage and confirmed in law.

That this contract is quite independent of the bond itself and is a covenant for the breach of which the damages allowed followed in course, and for which, under the cases cited, the city s liable for the market difference on a re-sale with like guaranty, was held in *Callanan* vs. *Brown* 31 Iowa, 333, where Brown & Co. after taking these contracts, negotiated some of the bonds on the strength of the covenants in the contracts, to Callanan, and were held liable to the same measure of damages, allowed against the City here.

X. The City affirms that the reception and sale of the bonds was a waiver of the covenant.

I beg to refer the Court to the opinion below (opp. p. 34,) as a full denial to this position.

With equal truth could it have been said in the last English case, that the receipt of the accepted draft was a waiver of the stipulation in the contract.

In *Murray vs. Stanton*, *ante*, the Court says, " after breach of the contract, plaintiff might retain and dispose of the bonds held by him without losing his right to recover * the difference of value at the time of breach " between an indorsed and unindorsed R. R. bond. "It is the essence of every covenant amounting to warranty, that the covenantee may receive the thing without objection for *apparent* defects, for the very object of the covenant is to protect him in so doing. But here the case is still stronger. The defect was not apparent, or upon the bond. That was, in form as agreed; but the covenant may as Lord Abinger says, for " something collateral to the express object " the bond —and so a warranty.

IV.

The next exception is to the allowance of the cost and expense incurred by defendants in collecting Paving Bills. By the charter, the special assessment was made out in the form of a bill against the lot owner, certified by the City Engineer. These bills were to be paid within ten days to the contractors directly, and if not, to be returned for collection by the City Attorney.—Few were paid within ten days; and from various causes collections, by voluntary payments were made with great difficulty. Over a million and a quarter dollars were to be collected during 1867 and 1868, and each bill was payable in *four* instalments. Tne City Attorney, personally, could do but a small part of this work. The contractors having an interest in the fund, were more efficient collectors than city officials. Their employees were numerous—from 100 to 300 daily. They could collect by exchanges, in work, in goods of all sorts, and they could prompt the tardy, and tempt the sordid by discounts in times of special strait.—The Mayor, City Attorney and some other officials therefore requested defendants to take charge of the collecting, and collect all possible without suit, and retain counsel to assist the City Attorney in the collection of others. They collected over $600,000. They paid $10,000 attorneys' fees, and they charged 10 per cent. on $250,000 of those bills especially difficult to collect. No question is made of the reasonableness of the charges, but, as the City *Council* did not, by any official act, direct the payment or employment, the City denies all liability therefor.

XI. The City Attorney and Mayor were empowered to employ, or authorize the employment of counsel and collectors to collect the paving bills.

The charter (amendment of 1866, Bridges' Dig. 215) provides for the delivery, by the engineer, of the special assessments to the city attorney for collection.

The ordinance provides the city attorney shall "*proceed to have the same collected.*" Bridges' Dig. 327, § 5.

The contract, Rec. 25, provides that the unpaid paving bills "shall be placed in the hands of the city attorney, for collection, under the city charter.

As to the Mayor the charter provides, (Br. Dig. p. 241), "The Mayor shall make all contracts authorized by the Board of Aldermen, unless otherwise ordered, *and shall supervise their execution*," (page 185). "The chief *executive* officer of the city shall be a Mayor."

Waddell, an experienced attorney and collector at Memphis, testifies, Rec. 181, in detail, to the modes of collecting, and says the Mayor and City Attorney urged them to make all possible efforts to collect the bills of lot owners, and were constantly apprised of the progress of the collections. Foster, City Engineer, Rec. 196, says, "the bills were returned to the contractors, with the request from the city authorities, to use every possible effort in pressing payment from lot owners."

Ballard, defendants' foreman, Rec. 260, says, "collections from lot owners were made only by persistent efforts, at the request and under the advice of the Mayor, City Attorney and other city officials, and both requested defendants to employ counsel, and the City Attorney introduced defendants to the counsel employed, Messrs. Humes & Poston, whom, at his request, defendants paid to assist him."

Baldwin, Rec. 250, substantially corroborates him.

Brown, defendant, Rec. 278, says: He retained such counsel to aid the City Attorney, and employed a large force of collectors, all at the request of the Mayor and City attorney.

Poston, one of the counsel, Rec. 303, says: "We were employed to assist the City Attorney, and at his suggestion," and because it was physicially impossible for him to attend to so enormous a task; and that 400 to 500 suits were brought, and this was but a part of the business, as a large amount was collected otherwise.

Duties imposed upon an officer, authorize him to incur the expense necessary to perform them.

In *Tucker & Sleight vs. Trustees of Rochester*, 7 Wend. 254, plaintiffs published accounts at request af defendants' Treasurer. It was made the duty of the Treasurer to publish such accounts, and his official compensation was fixed. Judge Nelson says, such an expense "was not incident to the office," and held the employment of plaintiffs by the Treasurer, bound the city. The authority to employ them was incident to his duties.

Here it was the official duty of the City Attorney to collect the bills. To perform that duty required the services of others to the fair value of $35,000. Was it "incident" to his office to pay this amount out of his salary in three years? This was a statutory duty. The citations of Judge Nelson show he was thereby empowered to bring all necessary suits, and therefore to incur all expenses necessary to so do. Under the doctrine of *Ransom vs. New York City*, 24 Barb., 226—4 Abb. Pr. R. 342, it was an executive duty with which the Council, as a legislatiue body, had nothing to do. Specific duties are imposed by the *statute* on specific officers. After a special assessmeut by the Council, "the City Engineer shall make out the accounts for such apportioned

cost of the improvement" against the lot owners, and "deliver them to the City Attorney *for collection*." Hence, under the statute the City Attorney has sole charge and authority—as a "department"—over their collection. And that the Council so understood the law, and also that it would be impossible for him *personally* to collect these bills, in the ordinance providing for this wholesale paving of the city, respecting these same bills, it decalres the City Attorney shall "proceed *to have* the same collected." The significance of this form of expression appears, when we reflect that for all this paving, allowing the ordinary front for lots of 25 feet, there would be over 20,000 bills, or nearly 100,000 separate collections of $25 to $100 each. The Council did not expect the City Attorney to do this in addition to his usual duties, but, "to have" it done; and it is the heighth of absurdity to construe the law as requiring the City Attorney to pay this out of his own means.

Again: By the contracts, which were *specially* authorized by the Council to be signed by the Mayor for the City, and adopted by the Council, Rec. 116, 118, 91, the prompt collection of these bills was the only escape for the city from its personal liability out of its general treasury, for the whole work, and this contract provides, that for this prompt collection, they shall be delivered to the City Attorney. Hence, *the contract itself bore the authority of the Council to the City Attorney* to employ whatever assistance was necessary to protect its general treasury, and accomplish the execution of the contracts in the very mode which the city is here claiming is the only mode contemplated by the parties. With what grace does she now deny this direct authority to the City Attorney to do what he did!

As to the Mayor—he too is a statutory officer, and required by law to "supervise the execution" of all contracts made. "Supervise" is to "oversee for direction" (Web. Dict.) By the

"direction" of the Mayor, Attorneys and Collectors were hired. There is no complaint that more was done or expended than was wise or necessary.

XII. Acts of corporate officers, which the corporation can lawfully authorize, or do, accompanied by circumstances of notoriety and acquiescence, may bind the corporation either as presumably properly authorized, or ratified.

This is the declared rule in Angel and Ames on Corporations, and is repeatedly affirmed in many cases, in this brief cited, and by the Tennessee Court, in *Adams vs. City of Memphis*, 2 Cold., 645, where the oft-repeated language of this Court is quoted and adopted, viz: that "corporations cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and engagements their own conduct had superinduced." Indeed, every presumption against an individual or a private corporation, applies to plaintiff. Its charter, Title 2, Sec. 3, Act of 1866, (Br. Dig., 182,) provides it "*may buy and sell property, real, personal and mixed * and may do and perform all other acts as natural persons.*" It thus has, within its boundaries *unlimited* powers as a *trading corporation.*

The following cases illustrate the rule:

City of Detroit vs. Jackson, 1 Doug., 106. The Mayor, without express authority, signed a submission paper for the city, to settle a dispute, and it was held, on objection that the *city* had not authorized the act, *that its execution was presumptive evidence of power to do so*, and that the city should have denied the power in that proceeding, if ever.

In *Glidden vs. The Town of Unity*, 33 N. H. 576, evidence of directions given by *one* of the selectmen, to plaintiff, to make out a bill for medical attendance on a pauper, was objected to, because *one* could not bind the town, but was held admissable as

tending to prove a prior contract, the court saying "many of their duties are ministerial and when performed by one the assent and concurrence of the others are to be presumed."

Here the Mayor is a member of the "Board of Mayor and Aldermen," and holds the two-thirds veto power.

Prop'rs. Fryeburg Canal vs. Frye, 5 Greenl., 42. This was a statutory submission of a dispute under contracts, and on appeal it is claimed the submission was not authorized by a vote of the corporation, though signed by a committee appointed to settle the matter in dispute. The Court says, "admitting (that the vote proven was insufficient to authorize the submission,) we do not know that there may not have been other votes, prior or subsequent to the submission by which it would appear the committee were clothed with competent power. * It cannot with propriety therefore be averred that it is apparent from the record that the Committee were not duly and legally empowered to bind the corporation."

In the case at bar, there is not a syllable of proof that the Board of Mayor and Aldermen did not authorize the acts of the Mayor and Attorney. The City Register, keeper of its minutes, was called by the city (Rec. p. 313), and produced his minutes, but *gave no testimony* on this point. His silence is significant.

In *Langdon vs. Town of Castleton*, 30 Vt. 290, plaintiff sued for attorney's fees in cases brought by him, but after his term of office as town attorney had ceased, and while his successor was acting in all new cases, and plaintiff recovered. The Court says, "The agent Spencer must have known of the suits, and the fair inference is, he knew of plaintiffs employment in them and was satisfied to leave them under his care and management, and this is equivalent to an employment."

In *Wash. Insurance Co. vs. St. Mary's Seminary*, 52 Mo. 480, defendant was sued on a premium note given by its President, who had *no express authority to insure its property or give its*

note. Defendant was held liable, and the Court remarks, "His authority to act in the premises is to be presumed from the high official position he holds."

And in *Bank vs. Gilstrap*, 45 Mo. 415, when the cashier *without express authority*, employed attorneys to conduct suits for the bank, the Court held that, as a *managing officer* he had the incident power to so bind the bank.

In *The City of Selma vs. Miller*, 46 Ala., 411, the city was held liable to the city physician for some thousands of dollars extra fees for attending small pox patients; yet the only authority for incurring the debt was the remark of *one* member of the council to the doctor, at a council meeting to which the doctor went to make some arrangement for such services, to "go on and attend to his small pox patients, and we will do what is right."

In *Allegheny City vs. McClarkan*, 14 Pa. St. 83, the language of the Court is, "There is power to contract undoubtedly, "and if a series of contracts have been made openly and palpa- "bly within the knowledge of the corporation, the public have a "right to *presume they are within the scope of the authority* "*granted.* * I cannot perceive that any principle is violated "by holding a corporation liable for the contracts of its accredit- "ed agents even not expressly authorized where these contracts "for a series of times were entered into publicly and in such a "manner as by necessary and irresistible implication to be within "the knowledge of the corporators."

The rule is fully sustained by this Court in *U. S. Bank vs. Danbridge*, 12 Wheat., 70; *Clark vs. Washington City*, 12 Wheat. 61; *R. R. Co. vs. Schuyler*, 34 N. Y. 30; *Town of Concord, vs. Bank*, 16 N. H. 29; *Dougherty vs. Hunter*, 54 Pa. St. 381, as well as by cases hereafter cited.

Glance now at the facts showing this knowledge and acquiescence.

Collections without suit were reported to the Engineer as made, (Rec. 191.) The suits were over 400 in number, and the Assistant Attorneys' names, joined with the City Attorney's appeared thereto, (p. 304.) The pendency of such suits was recited by the City Attorney in a communication to the Mayor for the Council. (p. 289.)

The Board consisted of 16 Aldermen and the Mayor. (See Record 114 & 120 for their names for 1867 & 1868.) Of these, eight were actually sued for their paving bills, (Rec. 358 to 363.) Of those sued, Ruffin was Mayor *pro tem.* (Rec. 294), and Hulburt was chairman of the Board in 1867. Some of the suits were tried in 1868 by Humes & Poston, the special Attorneys, before Hon. J. T. Swayne, who was Chairman of the Board in 1868, (Rec. 304), and said Attorneys were still prosecuting the suits in the Supreme Court without the interference or objection of the city or its Attorney, at the time this suit was heard before the Master, and the city admits it was then waiting for the trial of such cases by them, before bringing others. (Rec. 310.)

On this accumulated evidence the Master finds the fact "that the Attorneys and Collectors were hired at the request of the officers having charge and jurisdiction of such matters. (Rec. 347.)

The presumption of actual knowledge by every branch of the City Government is irresistible. Indeed it was not questioned below. The city rested upon the legal proposition that defendant was bound affirmatively to prove direct authority by the record of the Council's proceedings.

Here were over $600,000 of the revenues of the city collected by defendants. Was the Council so derelict to the interests of the city as to know nothing of how or by whom this was done?

bond loans, and the formal pledging for the bonds of the paving bills, on which suits had been brought by the City Attorney and his assistant counsel, in the contractor's names. (Rec. 267, 289, 35, 305,) and the statement of the City Attorney, in his receipt, that he had the legal charge of all the paving bills, (Rec. 289), show that *all departments* of the City Government well knew that, though in legal form the bills were with the City Attorney, yet that in fact they had been put into defendant's hands to collect, who notwithstanding all their expenditures and efforts were unable to collect enough to keep the work going. The City had the benefit of the money expended and labor, as the money collected went to pay her debt.

The law upon such a case is plain.

In *Selma vs. Mullen*, 46 Ala. 411, a Councilman, in the presence of the other Councilmen, told a city physician to "go on and attend to his small pox patients, and we will do what is right," and he went on, and the city was held liable for the services in a large sum. And see

Clark vs. *Washington City*, 12 Wheat., 61.
Town of Concord vs. *Bank of C.* 16 N. H., 29.
Dougherty vs. *Hunter*, 54 Pa. St. 381.
R. R. Co., vs. *Schuyler*, 34 N. Y., 30.
And see *post* estoppel.

V.

The next exception is to the allowance for adjusting the ...et R. R. to the pavement on Beal and Poplar sts. As the ...ets were graded and paved by the contractors, the street R.R. ...k had to be raised or lowered, or taken up and relaid to the grade of the pavement. This was done by defendants on 3 streets. This was work not embraced in defendants' contract, but the dispute arose between the City and the street R. R. Co., as to who should pay for it. On Main st., which was first paved, the City and Co. each paid half by agreement, Rec. 189. Failing to agree as to the others, the defendants to carry forward their paving, were obliged to do the same work on these two streets.

We have seen (Rec. 17,) that by the advertisement for bids, bidders were referred to the Engineer for informations, specifications, etc.

The Engineer testifies (Rec. 195,) that he and other city officers informed bidders they were not expected to adjust the R. R. track, but the R. R. Co. would do that, and the *contracts were let on that distinct understanding.*

Taft, 191, Mitchell, p. 272, Baldwin, p. 249, Ballard p. 260, all corroborate Foster, the Engineer; and the contract for Main street, shows conclusively that the contracts were based on the representations that such work was not to be done by contractors but would be done by others, as required to be done during the progress of the work. The case is quite like *Riley* vs. *City of Brooklyn*, 56 Barb., 559. Riley contracted to grade and pave a street at so much per lineal foot. He made the contract on representation by specifications that the job required 40,000 yards filling. In fact it took 65,000 yards, and this suit is to re-

cover for the extra work in filling, and the court gives him judgment upon the ground that the inducement to the contract was a misrepresentation of material facts, to be considered in contruing the contract; and as the extra filling had to be done to perform his contract, he was entitled to recover as for work done at the request of the City.

Such in substance and in detail is the case respecting this exception.

See also *Messenger* vs. *Buffalo*, 21 N. Y., 196,
Chaffee vs. *Granger*, 6 Mich., 52.

This is one of the items in which there was conflicting evidence. The Master reported a sum midway between the proof of the respective parties, $2,830, and ought to be as satisfactory to plaintiff as defendants.

VI.

The next exception is to an allowance for delays in the work.

The contract provides the city shall pay all damages for suspending work, Rec. 22. (14) The Mayor (p. 185), City Engineer (p. 193), Superintendent Ballard (p. 260) all testify to delays or suspensions at the order of the Mayor and Engineer, for causes not chargeable to defendants, aggregating 6 weeks to 2 months. The estimate of defendant's loss thereby is, $6,000 by Ballard (p. 260), and by Foster (p. 193), certain details of expenses which construed by the amount of the contracts, and time of work, give $3,000 to $4,000. The lowest figure was found by the Master.

Allaman vs. *Mayor &c. of Albany*, 43 Barb. 33, city held liable for delay to contractor, who on his part agreed to "commence work and proceed without delay," on a house, the Court holding the city impliedly bound to have the house ready so he could "commence and proceed without delay." By so much more, as the liability on an *express* over an *implied* obligation, is the case at bar stronger than the citation.

VII.

The next exception is to the charge against defendants of $40,000 scrip or city warrants, and $12,000 and $55,000 of bonds at their value instead of their face. In addition to the considerations hereinbefore argued, the city is bound by estoppel by the acts of its officers, long acquiesced in, touching these items, as it is also concerning all the others involved in this suit.

Respecting these particular items, there is no dispute of the facts. The $40,000 scrip was delivered to Taylor, McBean & Co., defendants' predecessors, the original contractors, to be sold, and the proceeds accounted for. It was sold at market rates, and the city books show a charge for the face and a credit for the discount, or in effect a charge for the amount allowed by the Master. This account was shown Brown & Co. by the comptroller, before the defendants assumed the contracts, and they were told the account was correct.

Respecting the $12,000 bonds, they were paid out to defendants as cash at 60c. This was 10c. above market value. They were charged by the city in its books at $7,200, and not otherwise. Respecting the $55,000 bonds charged defendant by the Master, at 52c., they were delivered during the work without any arrangement as to the rate. At the close of the work it was agreed between the defendants and Mayor that the bonds delivered in excess of the bonds due, as a payment in bonds on the 2d class of contracts should be applied as a credit on the 1st or or cash contracts at 52c.

Facts common to all this paper have been heretofore stated, (*ante* 22, 38), and see Rec. 213, 331, 333, 334, 211.

It is observed that all departments of the City Government took a hand in the discounting of its paper—the Mayor, Comp-

troller, Treasurer, Finance Committee, and Council. I do not evoke estoppel against acts that the corporation could not in any mode nor by any department legally do. The facts are too overwhelming here to warrant any nice discussion of dividing lines. Nobody will claim the city could not, through some officer, and by some mode, pass to others its bonds and scrip. It has passed it off here, and we say it is estopped claiming that it did not do it in the right way, or for an adequate consideration, for these particular acts were frequent, notorious, and brought to attention of the Council by reports, and acquiesced in without a murmur, till now first heard in the halls of judgment. And, like acts with others, it has been accustomed to do, not as exceptional occurrences, but as a *rule of conduct*, for at least ten years past. Among many cases I have looked into, where corporations of all kinds have been estopped denying the authority of their agents; or the legality of acts, the substance of which in any way the corporation had express or implied power to do, I have found none approaching this in the unopposed array of facts.

I therefore cite some of the cases without synopsis or comment.

De Voss vs. *City of Richmond*, 18 *Gratt*, 338.
Alleghany City vs. *McClarken*, 14 Pa. St. 83.
R. R. Co. vs. *Schuyler*, 34 N. Y., 50–60.
Trustees, &c. vs. *Aberdeen*, 13 S. & M. 647.
Peterson vs. *The Mayor*, 17 N. Y. 453.
Gas Co. vs. *San Francisco*, 9 Cal. 469.
U. S. Bank vs. *Dundridge*, 12 Wheat. 70.
Zabriskie vs. *R. R. Co.* 21 How. 381.
Adams vs. *Memphis City*, 2 Cold. 645.
Evans vs. *P. R. R. Co.*, 5 Philad. 512.

In conclusion,

We have seen that all the acts of the officers and agents of the city, which are here complained of, as not authorized by any legislative act of the Board of Mayor and Aldermen, were such acts as the same officers had for years been accustomed to do, and that their acts with these contractors were notoriously done, and continuously, through years of time and in the progress of its only great work of corporate improvement, and constantly brought to the knowledge of the corporate legislative body; and all this by the unquestioned evidence of its own corporate officers. It remains now to be considered whether these acts were in conflict with either the charter or ordinances of the city. I affirm they were in direct accordance with the law and with the ordinances, so far as this record discloses any corporate action on the subject.

The charter contains no directions or restrictions concerning the issue of warrants or bonds, save as stated, viz: the bonds should be issued only after a vote by the people, and for the purposes named. As to warrants, by the Act of Nov. 24th, 1866, it is provided they "shall be signed by the Mayor and Comptroller, and the Treasurer alone is authorized to pay them out only on the order of the Mayor countersigned by the Comptroller," and "weekly statements of the amount issued and on hand shall be published by both Treasurer and Comptroller," and "Banks and Bankers may receive and pay them out exempt from penalties against circulating small bills."

And the City Treasurer testifies (Rec. 199) that the city, to pay its debts and current expenses, "gave such an amount of scrip or warrants, as if sold at market rates would net the amount of cash due," and that "Brown & Co. were paid in the same way unless sometimes the city sold the paper, and paid them the proceeds."

Indeed, no question is made in the record but that all the paper was issued by the proper officers. It is simply and boldly claimed that defendants shall account for it at double they ever received for it, on the presumption that the city nor its officers could legally do that which it has thousands of times in fact done. Yet the above and only statute touching the issue of its treasury warrants, or scrip, plainly declares them a sort of depreciated currency, practically redeemable only in taxes.

Nor did the corporation, by any ordinance or resolution, *restrict* its officers as to the mode or rate of the issue of any such paper; but, on the contrary, all the acts of the City Council, proven in this record, show that its executive officers were directed to pay out or sell the bonds and warrants at their market value. Thus we have seen (Rec. 209) a general direction to the Mayor to pay "cash or its equivalent in city paper," and to use the bonds at less than par (Rec. 335). And respecting the execution of these particular contracts, we see (Rec. 89, (A.) that the Mayor and City Engineer are constituted the "*agents of the corporation*," *to audit the accounts of the contractors.* We have seen that when the accounts are thus audited the Mayor and Comptroller issue the order on the Treasurer, which may be sold as market paper, or presented to the Treasurer, who pays other warrants or scrip for it. Not only so, but, the contract provides that these same "corporate agents," (Rec. 89) are empowered, if the contractors do defective work, to buy materials and hire men to make the pavement good, and defray all expenses *out of moneys due the contractors under the contract;* and they are given general charge of the work, to start it, and for cause, to stop it, and withhold payments.

These contracts were adopted by the Council, and therefore have the force of ordinances, or corporate resolutions. (Rec. 116, 103) the whole business of supervising their execution and auditing accounts for work done, paying and providing means of

payment as the work progressed (at the rate of nearly a section daily, it was contemplated, Rec. 103), was given into the hands of the executive officers of the city, with full discretion; thus fully justifying the employment of collectors and attorneys, as well as the issue of its paper.

And respecting the Thirty-year Bonds, (which comprise *all* delivered to the contractors except the 5, 10 & 15 year bonds *paid*, under the bond contracts,) the ordinance provides, (Rec. 206,) "The *Mayor* is hereby authorized to issue the bonds of the city, &c., and when so issued shall be *used by the Mayor* for the payment of any due debt of the city," thus giving the absolute control of the whole issue to the Mayor; and as early as July 8, 1868, and before the delivery to defendants of a single one of the $277,000 thirty-year bonds, actually delivered them in loans and payments, the city had sold $100,000 at 50 per cent. and the Comptroller had reported that fact to the Council; and also that other bonds had been exchanged for scrip at the rate of 85c. in scrip for $1 in bonds. See Rec. 210; and on page 211 the whole issue is reported and accounted for at similar rates, without a word of disapproval from the Board, but with the disclosure that financial measures were adopted and ratified by "*secret or executive sessions of the Board*," of which doings *no record was kept*. See deposition of the City Register, Rec. 314.

The decree below is for $25,000 less than the fair value of the work done at the agreed rates, as shown by the evidence, and as found by both the Master and the Circuit Court. (See Opp. 37–39. Why this prolonged litigation, but for the ruin that an irresponsible corporation may bring to individuals by its delays?

We are constrained to believe that though there is a sectional pride in the investment, there is still a "sectional hate" for the investor who presumes to claim his own.

Sidley

IN THE SUPREME COURT OF THE UNITED STATES.

CITY OF MEMPHIS, appellant,
vs.
T. E. BROWN, appellee.
} No. 226.

SUPPLEMENTAL BRIEF FOR APPELLEE.

That the court may have the entire text of the several legislative acts and ordinances, so far as relating to the power and mode of issuing bonds and warrants or scrip, before it in order, we here print the same:

IMPROVEMENT BONDS.

Act of 1860.

Be it further enacted, That the Board of Mayor and Aldermen of said city of Memphis shall have power to issue time bonds of said city, having not over thirty years to run, payable in such city in the United States as in the discretion of said Board will enable them to be negotiated on the best terms, having interest coupons attached, at not exceeding ten per centum per annum, within the following limits and for the following purposes: 1. To an amount not exceeding five hundred thousand dollars, for the purpose of erecting permanent water works in said city. 2. To an amount not exceeding five hundred thousand dollars, for the construction and pavement of the principal streets and wharfs, or either, of said city, with iron, stone, or some system of construction and pavement of equal merit. [Here follow four other purposes.]

Provided, however, That no such bonds shall be issued for either of the purposes specified in this section, or any

other purpose, unless upon at least thirty days' notice of the time and place of election, the qualified voters of the city of Memphis shall instruct the Board of Mayor and Aldermen of said city to issue the same, by a majority of votes cast at such election: *And provided further*, That then no such bonds as specified in first, second, third, and sixth classes above shall be issued until and unless said Board of Mayor and Aldermen, first before such issue, provide by ordinance for the regular and prompt payment of the annual interest on such bonds, and also provide an annual sinking fund, to commence at least within six years after the issue of the bonds, and sufficient in amount to retire or redeem the same by maturity.

No bonds issued under this act.

Act of 1866.

They shall also have power, for the purpose of making any public improvement that may be deemed necessary for the city, or of acquiring any property for the public use of the city, to issue the bonds of the city, bearing interest not to exceed eight per cent. per annum, and having not more than thirty years to run; but this authority shall not be exercised unless the ordinance authorizing the same shall first be submitted to a vote of the qualified voters of the city, at an election to be held for that purpose, and after giving ten days' notice of the time and place of election in all the daily newspapers published in the city; and if a majority of those voting shall decide against the proposition the bonds shall not be issued.

PAVING BOND ORDINANCE.

May 31, 1867.

Be it ordained by the Mayor and Board of Aldermen of the city of Memphis:

1. That there shall be issued city bonds, with interest coupons attached, to the amount of $900,000, for the purpose of paving the streets and alleys of the city, and which shall be denominated "paving bonds."

2. A board of three trustees shall be appointed by the Mayor, with the advice and consent of the Board of Aldermen, to be called the "bond trustees," and who shall be appointed to serve until January, 1869, 1870, and 1871, the term of service of each to be determined by lot, and they shall be eligible to re-election.

3. It shall be the duty of said board of trustees to receive such portion of the revenue of the city as shall be paid them by the city treasurer, and to disburse the same in the following manner: First, to pay the interest on the bonds herein provided to be issued as the same become due; second, to invest any balance on hand in the bonds themselves at their market value, and to return the bonds and coupons thus retired to the city controller, who shall cancel the same.

SEC. 4. The city treasurer shall pay over weekly to said bond trustees one-sixth of his receipts from revenue, beginning on the second Tuesday in January, 1868, and continuing until the sum of $ shall have been paid.

SEC. 5. Said trustees shall each enter into bond in the penal sum of $ for the faithful discharge of the duties prescribed in this ordinance, and shall receive for compensation such salary as shall be allowed by the Board of Aldermen.

FUNDING BONDS.

Act of 1867.

SEC. 4. *And be it further enacted*, That the Board of Mayor and Aldermen, for the purpose of funding the debt

of the city, shall have power to issue bonds of the city, bearing interest at the rate of six per cent. per annum, and having not more than thirty years to run; but this authority shall not be exercised unless the ordinance authorizing the same shall first be submitted to a vote of the qualified voters of the city at an election to be held for that purpose, and after giving ten days' notice of the time and place of election in the daily newspapers of the city; and if a majority of those voting shall decide against the proposition, then the bonds shall not be issued

ORDINANCE UNDER ABOVE ACT.

Adopted by the Board of Alderman April 17, 1868.

Be it ordained by the Board of Mayor and Aldermen of the city of Memphis, as follows, to wit:

SECTION 1. That for the purpose of funding the debt of the city of Memphis, the Mayor is hereby authorized to issue the bonds of the city bearing six per cent. interest, to the amount of one million dollars, having thirty years to run, and payable in the cities of New York or Memphis at the option of the Mayor.

SEC. 2. Said bonds shall be issued in denominations of five hundred dollars and one thousand dollars, at the discretion of the Mayor, with coupons for interest, payable semi-annually, and when so issued shall be used by the Mayor for the payment of any of the due debts of the city.

SCRIP OR WARRANTS.

Act of 1866.

They shall have power to provide by ordinance for the issue of treasury warrants to an amount not to exceed one-half the revenue of the preceding year, and not to exceed five hundred thousand dollars in any one year, for the

purpose of paying ledger balances, outstanding city warrants, and to pay the current expenses of the city; said warrants to be in such form as may be determined on by the Mayor and Finance Committee of the Board of Aldermen.

Said warrants shall be of such denominations as the said Finance Committee may determine, and shall be receivable for all taxes, licenses, fines, and forfeitures in the police courts, and all debts due the city.

The said warrants shall be signed by the Mayor and Comptroller, and shall be issued by them to the City Treasurer in such sums as may be ordered by the Board of Aldermen.

The Treasurer is alone authorized to pay them out, and only on the order of the Mayor, countersigned by the Comptroller.

The banks, savings institutions, associations, and bankers of the State, may, if they think proper, receive and pay out all such city warrants without being subject to the penalties of any law of the State in regard to the circulation of notes under five dollars.

BONDS AND SCRIP PAID AND LOANED.

Cases involving fraud and embezzlement have not the slightest analogy to the case at bar. Yet such is evidently the case of McLean *vs.* The State, in Tennessee, not reported.

Gould *vs.* Sterling, 23 N. Y., 439, though denied by this court is decided on the point that the *purpose* was changed from a *borrowing of money* to a *loan of credit.*

Nor does County of Armstrong *vs.* Brinton, 47, Pa. St., 367, aid the city, but *contra.* There bonds are not commercial paper. The act of the Legislature forbade the sale of bonds paid on railroad stock subscriptions at less

than par, and "the act was plainly referred to on the face of the bond," and before buying defendant was notified the railroad company had no right to make the sale. He bought at 37 cents. Court says "he knew he was buying at a rate which the statute forbade. * * The people of Armstrong county (by their agents,) induced Mr. Brinton to pay into the treasury of the company $37 for every $100 of bonds he holds. No matter how unfairly they may have been dealt with by the railroad company, or *their own agents*, this is the extent and scope of *their act, and they are responsible for the full measure of it.*" The court decreed payment to defendant of the sum the railroad company received for the bonds.

Can Memphis, also, redeem the scrip and the bonds both loaned and paid defendants at the prices allowed in this decree? To illustrate: Since this decree Memphis has levied an annual special tax, payable *in cash only*, with which to *buy* in her bonds. In a recent report (here shown) it appears she bought about $100,000 of her bonds last year at a little less than 50 cents, the price she is allowed in this decree, and the quotations since show she is now buying them at 43 cents! Shall defendants, *her creditors*, be compelled to pay her a dollar for that which they received at and sold for but 50 cents, and which the city is now buying in at 43 cents?

Here, there was power "to issue for the purpose of paving," &c., power to make and use these bonds to accomplish a declared purpose.

In Lynde *vs.* The County, 16 Wall., 13, this court says: "It is not a valid objection that the bonds were made payable and were sold beyond the limits of the State of Iowa. The *power to issue* them carried with it authority to the county judge to do both these things—*to do what he deemed best for the interests of the county for which he was*

acting." The dissent is to the extra territorial exercise of the power, and the making of a different bond than that authorized.

Cases decided upon the principle that the contract is to pay money dischargeable by the delivery of specific property by a day certain, are also inapplicable; yet such is Railroad Company *vs.* Walker, 2 Head, 467.

ESTOPPEL.

(Under point *a*, p. 49 of Mr. Randolph's brief.)

Grant the corporation is not estopped as to acts it had no power under any conditions to lawfully do, (though *contra* the line of cases following Bissell *vs.* M. S. and N. Indiana Railroad Company, 22 N. Y., 258.) Here the direct authority is "to issue for the purpose of paving." It is not disputed that there was *power to issue*, and that the bonds were issued *by the proper officers.* But it is claimed the power is coupled with a *limitation not to issue unless a dollar in money or property be received for each nominal dollar in bonds.* But we are pointed to no such limitation *in the act*, nor to any clause from which it can be implied. Nor does the ordinance hint at any such limitation. But, on the contrary, the imaginary sinking fund commissioners are, from their mythical fund, to buy in "at their *market value*" any such bonds they can, showing the city expected them to be *put into the market.*

Now, as to what are called "funding" bonds. It seems from the treasurer's evidence (*Record*, 201) that but $15.000 of that brand were given defendants. They were used to "fund debts" and the *Mayor was authorized to use* them, and no limitation is expressed either in the act or ordinance. The city sold many at fifty cents, and the Council sanctioned the sales.—(*Record*, 210, 211, 335, 198.) Counsel says the Tennessee courts a *year later* enjoined

their use at less than par, but *gave no opinion*. This court has often suggested the propriety of restraining officers from an irregular or doubtful exercise of powers while refusing to give relief to the corporation *after* it has suffered its officers to act.—(*Sup's* vs. *Scheack*, 5 Wall., 781.) And in the same, and many other cases, declared that in construing laws for the issue of bonds where there is no constitutional peculiarity, it must decide for itself, notwithstanding the precedent decision of the State courts.

As to the scrip or warrants the law seems to be equally silent concerning limitations, while the section excepting bankers, who might receive and pay them out, from the penalties for passing small bills, officially baptizes them as "stump tail" currency.

We submit, therefore, tha the point and cases of Mr. Randolph, pp. 50, 51, are not applicable. But were there rregularities, either in the mode of exercising the power, or the officials by whom exercised, the city would be bound by the familiar and solid principles of this court in United States Bank *vs.* Danbridge, 12 Wheat., 70; Clark *vs.* Washington city, do. 61; Rogers *vs.* Burlington, 3 Wall., 666, and many other cases.

THE BOND LOAN RELEASE.

Much stress is still laid on a claimed release of the city, notwithstanding the decision of the Supreme Court of Tennessee, in Taylor *vs.* Hart, that the lot-owners were not liable, and the law of 1866, printed in Mr. Randolph's brief at page 8, unconstitutional and the assessments under it void. That opinion we file. It was rendered a year and a half since, and covers all the assessments made to pay the contracts in suit. What is its effect here?

The language of the asserted release is that Brown &

Co., in consideration of a *loan* of bonds, "will release the city, &c., unless the *courts of last resort* shall hold the property holders not liable."—(*Rec.*, 36.) Counsel for the city, at page 35 of the brief of Messrs. Carlyle and McPherson, say the effect of this was "the contractors agreed *not to sue* the city *until* the question of the liability of the property owners was determined, and if they were held liable by the courts of last resort, *then* to release the city entirely, otherwise the city to *remain liable.*"

Mr. Randolph, at page 62, says it was a *temporary compromise*, and if the lot-owners were held not liable, "the question was to be open and be subject to settlement *by suit.*" Counsel argue that it was an agreement to *forbear to sue until*, &c. Such a plea has always been denied as a bar or release. A covenant *never* to sue may be plead in bar, or as a release, to avoid circuity; but a covenant to forbear *for a time*, though on a consideration and though a ground of action, is no release or bar.—(*Ford* vs. *Beech*, 11 *Ad. and Ell., N. S.*, 852—11 *Q. B.*, 852, where the question is fully considered—*Garnett* vs. *Macon*, 2 *Brockenbrough*, *p.* 222.)

But it may be claimed (as below) that its effect was to change the guaranty from one of *payment* to one of *collection*, and such is the force of the city's plea that "defendants have not exhausted their legal remedy against the lot owners."—(*Rec.*, 128.) Yet if there was no debt due by the lot owner, the promise of the city remains absolute as before, as if one discharge a debt by the transfer and guaranty of a forged note, the promise is still single.

It may be also claimed that the contract was an operative release up to the happening of an event, viz: the decision of the Tennessee court, and this suit therefore premature. That is, the city represented it had debts by special assessments against certain lot-owners. We agreed to pursue

those debts to the end of the law, and meantime discharge the city with condition subsequent. But it turns out the city had no such debts. The discharge was predicated on the false representation, and is void *ab initio*.—(2 *Par. Notes and Bills*, 589.) And certainly no release.

In Chicago *vs.* The People, 56, Ill., 327–333, the city promised to pay for paving out of and when special assessments were collected, and the charter provided against any general liability of the city in such cases, yet, in this action, to compel payment out of the general treasury, while proceedings were in progress for special assessment, the court held it would determine whether the city had power to make a valid assessment; and holding it had not, ordered the city to pay, saying: "The condition of the contract was impossible and void, and the promise single and absolute. If a person promise to pay a sum of money when he collects his demands from another, then, if it appear that he had no demands, or had failed to use due dilligence to collect them, in either case the promise may be enforced as absolute."

Was the release ever valid? We raise the question here.

The court below held it invalid for non-performance by the city. It also held it inequitable, and would, therefore, refuse its enforcement. Were both these objections removed there yet remains back of them the question, Are the property-holders, or were they ever, liable for the paving? For counsel concede—as well they may—that if a "court of last resort" decides they are not and were not liable "the city *remains* liable." But the Supreme Court of Tennessee long ago so decided. Not only so, but *this* is a "court of last resort," and to it we here and now submit the question for decision. Following the Tennessee court, in this construction of its constitution

and laws, this court, we assume, will hold the lot-owners never were nor could be made liable for the paving. So deciding, the basis of the treaty is gone.

The effect of this decision is to nullify those clauses in the contracts providing that the defendants should receive their pay from the lot-owners. The language in *all* the contracts is, "the party of the first part (the city) *agree to pay*," then follow the words so practically nullified, "or cause to be paid" by the lot-owners.—(*Record*, 91, 81.) The modification of the "bond" contracts (*Record*, 118) does not touch the above promise by the city "*to pay.*" So much of it only as is quoted by Mr. Randolph at page 65, concerning special assessments, is rendered "impossible and void." The city is still bound. In Maher *vs.* Chicago, 38 Ill., 273, under the charter cited *ante*, it is said, "If a municipal corporation in dealing with individuals assumes that it has certain powers upon which the validity of its acts depends, and it turns out that it does not possess the specific powers relied on, it is not thereby excused from the performance of its obligations. If they can be performed through the agency of other powers that it does possess * * * it was expected the debt would be paid out of a particular fund. In this the debtor has failed, *but the debt remains.*"

In Louisville *vs.* Henderson, 5 Bush., Ky., 516, such a stipulation in a paving contract as is here claimed a release is, without discussion, said to be *void.*

In Cronan *vs.* Municip. No. 1, 5 La. Ann., 537, where the contract was to look to the special assessments, the court, *in this case* against the city, held the assessment illegal and *therefore* the city bound.

Such contracts are substantially a warranty of power as well as a contract for its exercise.—*Keany vs. Covington*, 1 *Metc., Ky.*, 339; *Michal vs. Police Jury*, 9 *La. Ann.*, 67, and cases in note §§ 400, 401, Dilion Corp.

The doctrine of implied liability, argued against in Mr. Randolph's brief, pages 76 to 79, and the cases cited, we think quite inapplicable. In our contracts there is not only the provision "*to cause*" the lot-owners to pay, but the additional promise of the city to pay. Not only no limitation of the undertaking to the special assessments, but the negation of any such implication by the independent promise of the city.

The cases thus cited are of three classes: First. Where the contract was made in *violation* of law, as without bids, when the law required bidding. Second. Where the charter *forbid* liability out of the general treasury. But in all these cases the city had power to lay the special assessments. Third. Where the contract was made by some officer, as one step prescribed by statute in a matter of public improvement, and not as an act of corporate will and judgment. But here, too, the directory statutes afforded a complete remedy.

SINKING FUND.

(Page 86 of Mr. Randolph's brief.)

By reference to the law of 1866, under which the $900,000 issue of paving bonds was made, (the act of 1860 limiting the issue thereunder to $500,000,) no provision for any sinking fund is found. Mr. Randolph's statement is evidently an error.

Whatever rights the defendants or the bondholders might have under the *ordinance*, still defendants were not content therewith. Hence the covenant in the contract. But this is meaningless if its breach gives no cause of action—a position not only obviously absurd under the evidence, but judicially determined. Let the city mete out to us by the measure measured against us on this very covenant.—*Callanan vs Brown & Co.*, 31 *Iowa* 333.

(*a*) MANDAMUS.

It would be difficult to realize any practical good if a mandamus issued to enforce the *ordinance*. You must mandamus: (1) the Mayor, to nominate; (2) the Council, to confirm or reject; if a confirmation was ever got, (3) the Trustees, to qualify; and if successful there, then (4) the Treasurer, who would make return, as he has testified, (*Record*, 203,) that as he received the taxes in scrip he could pay over no money, and the farce would end.

(*b*) But it is said the bondholders took the statute security with the bonds; but the rule doesn't fit the case. (1) Defendants' right is on a covenant personal, not public, and which defendants could not assign to split into a thousand actions by as many bondholders. (2) The security not being made, as covenanted, could not pass. (3) The purchaser brought but the unsecured bond at the depreciated value of all such bonds issued by the city, and has no complaint to make.

It is familiar law that mandamus does not lie except to perform a plain statute duty, and where the party has no other adequate remedy for the breach of the public duty, as by contract, as is the case here.

CALCULATION OF DAMAGES.

The calculation of Mr. Randolph at the end of his brief to prove the amount allowed defendants too large,

is not reliable for two reasons. First, as the prices varied on different streets, he has selected the only street favorable to him, and not an average. Second, he has omitted two items entirely.

We submit the following as to that street:

Cash price for the paving - - - - - - - - -	$3 95
For grading, (Rec. 118,) - - - - - - - - - -	40
For remitted royalty, (Rec. 118,) the city's proportion being one-fourth of all, (Rec. 14, Ex. L.) -	6
	4 41

Bond price for all the work, $5 75.

This gives 76⅔ as the estimated value of the bonds instead of 68 cents as calculated by counsel, and is 1⅓ cents below the estimate in the decree, which is 78 cents, (Opp. 37.)

Now take Shelby street, (Rec. 68:)

Cash for paving - - - - - - - - - - - - - -	$3 89
Cash for grading - - - - - - - - - - - - -	40
Proportion of remitted royalty - - - - - - -	5
	4 34

Bond price for all such work, $5 25.

This gives 83.86 cents as the estimated value of the bonds, or 5.86 cents *above* the estimate in the decree.

An average of the other three streets (De Soto, Beal, and Poplar) gives—

Total cash price for the work - - - -	$4 34
Total bond price for the work - - - - -	5 55

Which gives 78 1-5 cents as the estimated value of the bonds. An average of all the above streets gives the estimated value of bonds at 79 1-5 cents.

But this is not all: By a comparison of the cash and bond prices on the curbing, the estimated value of the bonds was a little over 90 cents. An exact and detailed

calculation of all the items, such as the master made, (*Opp.* 38,) would add materially to the aggregate; but the above is sufficient to *absolutely demonstrate* the decree too low rather than too high on this evidence.

Suggestion is made, but not argued, that the conclusion of the city's answer to cross bill is a demurrer, and was not passed upon, and should have been sustained. It may be answered—

(1.) It was waived by plaintiff's silence.

(2.) Equity has jurisdiction of all matters growing out of the mutual dealings of the parties, and will do complete justice, whether under the form of the answer or the cross bill.

Kelsey vs. Hobby, 16 Pet., 269; Power vs. Reeder, 9 Dana, 5; 1 Bro., P. C. 175; Duke of Marlborough's case; McIntosh vs. Gt. W. Ry., 3 Sm. & Giff., 146; Dabbs vs. Nugent, 11 Jur., (N. S.,) Pt. 1, 945; Nixon vs. Taff V. Ry., 7 Hare, 136; S. C., 1 H. of L. Cas., 110; Corp. Carlisle vs. Nelson, 13 Ves. Jr., 278; Coskey & Wolf vs. E. and A. S. S. Co., 6 Jur., N. S., 1190; Kimberly vs. Dick. L. R., 13 Eq. Cas., 1–21; S. E. Ry. Co. vs. Brogden, 3 McN. & G., 8; Schenck vs. Peay & B., 1 Wool, C. C., 181.

Other points made are covered by the prior briefs and opinion of the court below.

S. SIBLEY,
Counsel for Appellee.

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Supreme Court of the United States.

CITY OF MEMPHIS
v.
T.E. BROWN & Co.
} No. 226.

Brief of P. PHILLIPS,

for Appellee.

S. & R. O. POLKINHORN, PRINTERS, D ST. NEAR SEVENTH.

Supreme Court of United States.

CITY OF MEMPHIS
v.
T.E.BROWN & Co.
No. 226.

Brief of P. PHILLIPS,

for Appellee.

THE CONTRACTS.

On the 11 March, 1867, the city of Memphis contracted with Taylor, McBean & Co., of Chicago, for laying the Nicholson pavement in certain streets of that city.

By this agreement the contractors were to receive, upon the completion of each section, from the owners of lots fronting the improvement, one-half of the price in cash and the remainder in thirty, sixty, and ninety days.

The accounts were to be made out by the city engineer and delivered to the contractors, and if the owners refused to pay, the accounts were then to be placed in the hands of the city attorney for collection.

The city was to pay for the intersections of the streets and alleys, and for the squares and other public property.

The city "guaranteed to the contractors the payment of said accounts assessed against the property owners." p. 25.

On the 16 July, 1867, the city entered into a contract, for paving other streets, with Forest, Mitchell & Co.

Upon the completion of each section the city was to pay the whole amount due in city paving bonds, payable in five, ten, fifteen years, in equal proportions, with six per cent coupons attached, payable semi-annually. Principal and interest *guaranteed and provided for by a sinking fund set aside for that purpose. Bonds to be taken at par.* p. 33.

On the 15 October, 1867, a modification was made in this contract by which another price was determined on. The amounts so fixed to be assessed and collected in the manner prescribed in the Taylor, McBean & Co. contract. But, as to the city property, this was to be paid for in the paving bonds, on the terms and conditions of the original contract with F., M. & Co. p. 118.

On the 15 October, 1867, F., M. & Co. addressed the following letter to the city.

"Having made arrangements with Taylor, McBean & Co., to complete the work of paving the streets unfinished under our contracts, we ask that your Board will substitute them for us both in the remaining original and modified contracts." This was accepted by the Board. p. 119.

The assignment of T., McB. & Co., to which this refers, is a full transfer of all interest in the contract, and also of "all claims for debts, demands and damages

against the city, already accrued, or may hereafter accrue, for any and all breaches of contract, with the right to sue for and recover the same. p. 312.

On the 2 June, 1868, T., McB. & Co., sell and assign to T. E. Brown & Co. all their right and interest in the aforesaid contracts, and in all claims for moneys due, or to become due, and for all damages against said city for failure to comply with its stipulations, with power to sue for and collect the same. p. 312.

This transfer was ratified by the Board. p. 121.

By the "agreed statement," p. 307, the aggregate value of work, opposite private property under the *cash* contracts, or those originally let to T., McB. & Co., was..... $360,550

For work under same contracts, opposite city property and intersections,..... 86,769

For work under BOND contracts, or those let to F., M. & Co., up to October, 1867, date of modification,..... 155,962

For work under last contracts since the modification, opposite city property and intersections,..... 166,407

For work since the modification, opposite private property,..... 708,913

$1,478,601

The contractors have shown that the work was well and faithfully performed. On the other hand it is shown by the evidence of city officials that the city has always been delinquent in its payment. The city, says Mayor Lofland, never paid any cash to the contractors; they were generally behind, and the contractors had great trouble to get their pay in any manner. p. 184.

It is shown that the city had, for ten years, dealt with

its bonds, notes and warrants, as merchantable paper, subject to the market quotation. pp. 199, 229, 250, 263.

The average price of the bonds was fifty cents, and the warrants much less.

There is no discrepancy in the evidence as to the foregoing facts. The city was in an insolvent condition, and resorted to all the shifts and devices which are unfortunately too usual under such circumstances.

THE MASTER'S REPORT.

It is objected that the case was prematurely referred to the master. The cause was put at issue by replication on 7th April, and in the order of reference the parties were allowed to take evidence up to the date of filing the report, which was on 2d September. The complainant was not deprived of any time asked for. On the contrary, the report concludes with the statement, "thereupon the counsel of the respective parties announced that they desired to offer no further evidence." p. 341. The examination was commenced on 25 May, and was always conducted in the presence of both parties.

In matters of account the court may, in the first instance, refer to the master.

Field v. Holland, 6 Cr., 25.

No exceptions were taken before the master. They were made in the court some time after the report was filed. It is submitted that such exceptions cannot be considered.

Where the rules of the Supreme Court do not apply, the Circuit Courts are regulated by the practice of the High Court of Chancery in England.

Story v. Livingston, 13 Pet., 368.

Smith, in his Chancery Practice, says: "Exceptions

to the report cannot be taken, (except in a few cases under special circumstances,) unless objections have been left in the master's office, and that it is not only necessary that objections to the draft report should precede the exceptions, but the practice requires that the exceptions should be strictly in conformity with the objections."

2 Vol., 372.

In McMechen v. Perry, this court say: "The appellant objects that his debt was not accurately ascertained by the master upon the decree of reference. In Story v. Livingston, 13 Pet., 359, this court decided, that *no objections to a master's report can be made which were not taken before the master;* the object being to save time and to give him an opportunity to correct his errors and reconsider his opinion."

18 How., 510.

This subject is fully discussed and the same conclusion reached, in Troy Factory v. Corning, 6 Blatch., 328.

Assuming the exceptions to be well taken, we pass to the consideration of those most material.

And first, as to the allowance for the difference of value in the bonds delivered and those agreed to be delivered.

THE SINKING FUND.

It will be seen that by the contract with F., M. & Co., that the bonds were to be taken at par, but these bonds, principal and interest, were to be "*guaranteed and provided for by a sinking fund set aside for that purpose.*"

The bid for the contract by F., M. & Co. was made on the representation by the city of the probable value of the bonds thus secured, and on the basis of 90 cents in the dollar.

Under such inducements and representations the contract was entered into and bonds received. But the city failed to provide the sinking fund, and the bonds had to be sold at 50 cents.

See deposition Mitchell, p. 271.
" " Lofland, Mayor, p. 184.
" " Foster, City Engineer, p. 196.
" " Salter, p. 229.
" " Baldwin, p. 249.

If these bonds had been secured as provided for by the contract, they would have been worth from 80 to 90 cents.

Elder, p. 175.
Tobey, p. 176.
Murphey, p. 177.
Barrett, p. 179.
Salter, p. 229.
Levy, p. 252.

Hachfield testifies that the city's wharf bonds thus secured, were sold at 87½. P. 257.

For the damage thus suffered by the contractors, the Master allowed the sum of $115,216, calculating the amount on the basis of difference between 50 cents, the market value, and what would have been that value as testified by witnesses, had the sinking fund been provided.

The Chancery Court did not sanction this estimate. The City was allowed to reopen the case and examine witnesses to this point.

The city availed itself of this proposition and a large number of witnesses were examined. They varied from 65 to 85 cents, and the evidence was submitted by the master to the judgment of the court. p. 402.

The decree fixed the damage on the basis of 78 instead of 85 as originally reported by the master. See opinion, (pamphlet p. 36.)

The account is stated by charging the contractor with the face value of the bonds, and crediting him with the damage on the basis thus calculated.

It is said that by the acceptance of the bonds without objection, there was an implied waiver of the agreement that a sinking fund should be provided for their payment. That is, that the parties tacitly accepted bonds which were worth in the market but 50 cents, when they were entitled to a security that would have raised their value to 80 or 90 cents.

The court would require a very strong showing that such was the intent of the accepting party to reach a result so injurious to his interests.

It was not necessary before receiving them that Brown should have required authentic evidence that the fund was provided. He had the right to rely on the promise, and it is a fraud on the part of the city to attempt an escape from its breach of promise in setting up such a defense.

It was decided in Street v. Blay, and Poulton v. Latimore, cited in the note by Smith in his leading cases to Cutter v. Powell, that in cases of warranty, the vendee has three courses:

1. He may refuse to receive the article at all.

2. He may receive it and bring his cross action for the breach of the warranty.

3. He may use the breach of warranty in reduction of damages, in an action brought by the vendor for the price.

This court in commenting on this doctrine, say, the 2d

and 3d propositions of this learned author are indisputable, and have received the sanction of the court in Thorton v. Wynn, 12 Wheat, 183, as modified by Withers v. Greene, 9 Howd., 213.

Lyon v. Bertram, 20 How., 154,

That the city was not discharged from this liability by virtue of the release in the loan contract is shown subsequently.

Besides this, that release from all liability was to become inoperative in case the Supreme Court of the State decided that the property holders were not liable, and since the decree in this case they have so decided.

THE LOAN CONTRACTS.

Another objection is to the allowance of the market value of the bonds, instead of the full amount of their face value.

The contracts referred to, are as follows:

On 1 September, '68, the Mayor reported, that owing to the delinquency of the property owners, he had agreed with the consent of the Board of Alderman, in executive session, to loan $100,000 bonds, at $100, for 18 months, to be secured by transfer of paving bill to like amount.—Approved. p. 305,

On 18 November, '68, another resolution was adopted to loan 175 of the 30 year bonds on a like security, and on the further consideration of a *release to the city* "*from all liability upon said paving contracts, unless it should be decided by the court of the last resort, that the property holders were not liable for said pavement.* p. 306.

The bill of the city, filed 4 November, 1870, *inter alia*, sought to enforce these contracts as loans, and to

free itself from all liability, by virtue of the release above recited, and to have the account between the parties taken on this basis.

Brown had commenced his action on the law side of the court, against the city, and to bring this litigation to a speedy close, by agreement of parties, the matters in issue in the suit at law, were made a part of the equity cause.

The bill averred the delivery of the bonds—on the second loan $140,000—and that for the remaining $35,000, a delivery of their letters called acceptances.

We give the form of one of these letters.

" As soon at it is possible to sign them I will issue to your order with the January coupons, on———30 year bonds on the loan of November 18, 1868. You may use this in any negotiation, and the bonds can be delivered to your order on the return of this letter. p. 298.

Brown, in his answer, describes the large indebtedness of the city to him, at the date of these loans; its repeated failure to comply with its contracts, and expressly avers that these were mere nominal loans, but in reality, and by express agreement, merely modes of enabling him to go on with the work by selling the bonds and so realiz ing for what was due to him.

That these agreements were never performed by the city. That on the first loan only 89 bonds could be obtained; that on the second loan, though the city had in its possession blank bonds which only required signature, they refused to deliver any, though daily importuned. That on the 1 December, instead of bonds, the city would only deliver its letters called " acceptances." No steps were taken to fulfil the promise therein contained. Only 25 bonds were delivered on these letters, as late as 15 December, and some others at the close of

this month, and in January, 1869; some not until May following, and that $11,000 of the first loan, and $35,000, of the second were never delivered at all. pp. 53, 54.

Further, that the bonds delivered in May, were in violation of the agreement, shorn of the coupons for January and July, 1869,—and again, that the city had, in violation of the agreement, put it out of its power to fulfill it, by appropriating $40,000 of these bonds agreed to be thus loaned, to other uses.

It is also averred in the answer that at the time these pretended loans were made, these bonds had a well known market value of but 50 cents, and from that time to this they have been sold for no more.

The answer is strictly responsive to the bill, and throws upon the complainant the burthen of disproving its averments.

But we need not resort to this rule of evidence, for in this case there are no disputed facts—the evidence is entirely harmonious.

At the time of these pretended loans the city was indebted to Brown about a half million of dollars.

It had never paid the contractors one dollar in cash, nor fulfilled any of its obligations. Its constant and persistent delinquency had driven out the two first contractors in despair, and brought the third to the brink of bankruptcy.

In this state of affairs it refused to make any payment or fulfill any of its obligations. The only thing it would do was to make these loans.

Here is a case of moral duress. The relation of the parties by this arrangement is reversed. Brown, the creditor to a large amount, becomes debtor. The city

the debtor,—has its liabilities all extinguished,—and becomes a creditor by a loan at interest.

A court of equity will not lend its aid to enforce so unconscionable an agreement. It will never exercise its discretion to enforce even a hard bargain, when the party invoking its aid is himself in default.

The difference between that degree of unfairness which will induce a court of equity to interfere actively in setting aside a contract, and that which will induce the court to withhold its aid, is well settled.

On a bill filed to enforce the contract, the defendant can resist it by showing that it was unconscientious or unreasonable.

And in judging of the unfairness, the court will not look merely at the terms of the agreement itself, but at the *relation of the parties*, and all the surrounding circumstances.

Cathcart v. Robinson, 5 Pet., 276.

Marble Co. ——— 10 Wall., 357.

Kitchens v. Raymond, this term.

Crane v. Decamp, 6 C. E. Greene.

If the agreement had been a fair one, it was never performed by the city. It was to deliver bonds; instead of these, it delivered letters. These letters promised an immediate delivery of bonds; this promise was also violated. The delivery was delayed unreasonably. A large amount was never delivered at all. Of the bonds delivered the coupons for January and July were exscinded in express violation of the terms. These are the circumstances under which the city files its bill to enforce these contracts.

The evidence, showing the want of good faith on the part of the city, and its failure to fulfil these agreements,

is not contradicted, and will be found in the depositions of

Venable, p. 220.
Barrett, p. 221.
Brown, p. 279.

The evidence also shows the true understanding between the parties in reference to the transaction. The bonds were in fact delivered to enable Brown to dispose of them for the purpose of going on with the work.

Ballard testifies "these bonds were given with the express understanding that they should be sold to meet our bills payable, then rapidly maturing. p. 264. A more full account of the character of this agreement is given by Ballard, at p. 267.

It would be very extraordinary that Brown should have agreed to receive and return these bonds at par with interest, when for ten years their market value was but fifty cents. The day after he received them he sold them at forty-nine cents.

As bearing on this question it will be remembered that when the contract with F., M. & Co. was made, it was therein expressly stipulated that the bonds were to be received *at par*, and the price of the work was fixed according to the estimate of such bonds secured by a sinking fund.

When the second contract was modified so that *cash* was to be paid for work in front of private property, and bonds only for the intersections, the price of the whole work was greatly reduced.

We submit, therefore, that the master was right in crediting the city with the true value of these bonds and interest thereon.

The stipulation for the return of bonds would be fulfilled by the delivery of like bonds to an equal amount; and this is what the parties agreed should be done as testified to by Ballard, at p. 267.

When the city, in violation of their agreement diverted $35,000 of the bonds which had been appropriated to Brown and delivered them to the bank to pay its interest, these bonds were sold for this purpose at fifty cents.

The evidence of Bridges, the city Treasurer, shows that in 1868 and 1869, the city raised its revenue by the sale of its bonds at fifty cents. $750,000 bonds were disposed of at that price. p. 198.

Again the records of the corporation, produced by it in evidence, show that on the 3 March, 1869, a resolution was adopted that bonds should not be put in the market except at their face value.

A few days thereafter, to wit, on 27 March, 1869, it was resolved "that the resolution passed at a previous meeting of the Board prohibiting the use of bonds, except at par, be repealed." p. 335.

THE $40,000 SCRIP.

Brown, in his answer, admits the receipt of warrants to this amount on account of the cash indebtedness of the city, on the agreement that he was to sell the same and credit the city with the proceeds. They were so sold for $17,772, which amount was credited to the city by the master. p. 48.

In the city accounts produced by Richards, the city Register, a witness examined on behalf of the city, is the following entry.

1868, *August* 7.

By discount on scrip per comptroller's order, August 7, 1868,	$21,677.50
Profit and loss	18,322.50
	$40,000.00

p. 317.

The deposition of the Mayor shows that the city scrip had been used on the same loans with Taylor, McBean & Co., the former contractors. He says, "the city did not pay the contractors in cash as per agreement, but in city warrants at their market values." p. 183.

In this mode the city expenses were paid and the scrip was sold at 35 to 50 cts. p. 184.

The city Treasurer testifies, that the amount due in cash to T., McB. & Co., and to Brown, was made by "delivery to them of such an amount of city paper, as if sold at market rates, would nett so much cash." p. 199.

And this had been the practice for ten years past in respect to its bonds, notes, warrants &c. p. 200.

He also refers to the comptroller's report, containing an account of the city, in which is the item including the "discount on sale of bonds, $630,654." p. 213.

THE $55,334 BOND TRANSACTION.

The receipt of these bonds is admitted by Brown in his answer, but he avers that they were taken by agreement at 52 cents, and on account of the cash amount then due by the city.

The exception is that the master credited the city on this amount with the sum of $28,774, instead of the whole amount.

Brown's answer as to the agreement is supported by his deposition p. 279, and by that of Ballard, p. 262, and is uncontradicted by any evidence on part of complainant.

THE $12,000 OF BOND.

It is also objected that the master allowed the city a credit on this account of but $7,200.

The agreement in this case was to allow the city sixty cents, though the bonds were then worth in the market but fifty cents and were in fact sold the next day for fifty, cents.

This transaction affords another proof of the distressed condition of the contractor produced by the want of good faith on the part of the city.

The depositions of Brown and of Ballard, fully establish the agreement. p. 263.

It is also evidenced by the corporation books that this transaction was duly reported to the board. In their account with Brown, it is thus entered, "proceeds of 12 bonds, $7,200." p. 12.

THE PAVING IN FRONT OF PRIVATE PROPERTY.

It is objected that the city is debited with the amount of this work.

By the terms of the contract the bills against the property holders, were payable one-half in cash, and the other half, in thirty, sixty and ninety days, and the city guaranteed the payment.

The contractor's agreement was with the city, and not the property holders,

The bills were to be made out by the city authorities, and delivered to the contractors, and if not paid, they were to be returned to the city to be collected by its attorney.

The city seeks to evade this guaranty by reason of the release contained in the loan contract of 18 November, 1868.

We have already shown that this release was inoperative by reason of the non-fulfilment of the terms of the agreement and the decision of the Supreme Court of the State.

The city was therefore properly charged by the master with the amount of the uncollected bills.

THE AMOUNT ALLOWED FOR COLLECTION OF PAVING BILLS.

It is again objected that the master allowed for services in collecting the paving bills.

These services were rendered at the request of the city and involved the empyloyment of numerous agents as well as attornies.

Through these agencies, Brown collected without suit $637,292, besides notes taken as collateral to the amount of $25,000, and for these services the master allowed $25,000.

The extraordinary efforts and unusual means employed for this purpose, are fully described in the deposition of Waddell and Baldwin. p. 180, 250.

Merchandise of all kinds, horses, wagons, &c., were received in payment at prices throwing a heavy loss on the contractor. A store had to be opened for the resale of these articles. The bills due by proprietors of hotels, were collected by sending persons to board with them. In this manner one hotel, the Overton, paid their bill of $4000. Deposition of Waddell, p. 180; Baldwin, p. 250.

The majority of the property holders refused absolutely to pay anything, declaring that the city had no power to assess them. Against these some 4 or 500 suits were commenced, and these were brought by Humes and Poston, and Jarnagin, Morgan & Frazier, employed for the purpose. For their services in this litigation, the master allowed $10,000.

It will be remembered that by the contract, the city

guaranteed the payment of the bills, one half of which was to be paid in cash, and the remainder in 30, 60 and 90 days. *These bills the city was bound to collect at its own expense.*

The evidence on which the city is held liable for the items allowed by the master is to be found in the following depositions.

WADDEL testifies, that "the Mayor and city attorney were apprised of the extraordinary efforts we were making to effect collections without suits, and approved the same, and urged us to make all possible." In frequent visits to Mayor Leftwitch he expressed "his anxiety for us to effect collections in the manner we were pursuing, his idea being to get as much as possible without suit. My recollection is that Mr. Morgan, the city attorney advised the same course." p. 181.

FRANCIS FOSTER, city Engineer—"The unpaid bills were from time to time returned to me by the contractors, and I placed them in the Mayor's hand for presentation to the city attorney under the terms of the contract. The bills were afterwards *returned to the contractors* by the hand of Mr. Salter, with *a request of the city authorities* for the contractors to use every effort in pressing the payment of the bills without resorting to the league measures contemplated by the contract." p. 196.

BALDWIN. "Brown & Co., made every effort that could be made by themselves, and all the assistance they could get, running through two or three years. The Mayor of the city and city attorney requested Brown & Co. to make all the collections they possibly could before bringing suit. I know that Brown & Co. employed attorneys to make collections of these bills. They did so at the request of the city attorney. p. 250.

BALLARD. "From shortly after the work commenced,

to June '69, collections were made with the greatest and most persistent efforts from property owners at the request and under the advice of the Mayor, city attorney, and other city officers. For this purpose the contractors not only kept constantly four or five men employed, but also the employees were directed to make exchanges for material, labor, goods, and everything which would go to make up and lesson our cash expenses. All this was done at a loss from 10 to 20 per cent. In my judgment $25,000 would be a low charge to the city for all that was done by the contractors not required by the contract of them in making collections without suit."

Both the city attorney Morgan and Mayor Leftwitch, suggested to the contractors to retain counsel to assist the city in looking up titles, learning the proper parties to be made defendants, and bringing the many suits on the bills. I remember distinctly Col. Morgan said that it would be impossible for him, or any one man with all the other city business, to attend to this matter alone, and that somebody must be retained to assist him; and, after some reflection, he said he would prefer Messrs. Humes & Poston. p. 260-1.

Brown. "The collections that have been made by us, both by suit and otherwise, have been made under the direction of the city, and at the city's request. Both the Mayor Leftwitch and city attorney Morgan requested that every effort should be made to collect bills without suit, by turns and trades, exchanges and discounts, and putting a large collection force at work, and making every effort to work as many of the bills into the paving of the streets as possible. Their advice and direction was followed. After it became evident it was necessary to sue, the city authorities advised suits to be brought and to employ counsel to aid Col. Morgan in

the examination of titles, drafting papers and the work of suing. Col. Morgan took us to the office of Humes & Poston, saying that the city business outside of this was so large that it would be impossible for him to bring these suits; that he must have assistance and preferred them. The Mayor said substantially the same thing, and under their direction I retained Humes & Poston, who brought about 400 suits. p. 278.

On cross-examination, he says—"I did not at the time understand that we had employed as counsel, the firm of Morgan, Jarnagin & Frasier, as I supposed whatever they did, would be done for the city, as Morgan, of that firm, was city attorney.

But afterwards it was claimed by the firm, that Mr. Langdon when here had employed them, and that it was not their understanding that Jarnagin & Frasier should do what they did, on account of Morgan's relation to the city, as attorney.

The amount paid to them was $2,300. p. 280.

Among the accounts produced by Hoy, clerk to the corporation, examined on its behalf, is one rendered by Brown, and shows this entry.

Amount paid for bringing suits on pavement bills, and other legal services which under our contract with the city, the city agreed to do, but did not do. $8,000

Court costs advanced.

Commissions paid on collections, p. 292.

The amount of labor performed by the attorneys thus employed, is fully set forth in the deposition of Mr Poston of the firm of Humes & Poston, p. 303.

We have here the express evidence that both the Mayor, and city attorney, directed Brown to use all the means necessary to collect as much as could be done without

suit, and when these means were exhausted to employ counsel to bring suits.

The work to be thus done was in the discharge of an obligation, which the law of the contract imposed on the city.

It was done in the presence of the city with its full knowledge and acquiescence.

The city had full knowledge that the labor was being performed at its cost, as shown by the account referred to.

The city has reaped the full benefit of the services performed.

Under these circumstances it cannot escape responsibility by saying to the defendant you have not shown that the city ever passed an ordinance or resolution which authorized the Mayor and city attorney to enter into such an engagement.

The city has not offered any evidence to rebut the presumptions which arise from the acts of its agents. It has not produced its records, and *what is very significant*, while the witnesses specially name the Mayor, and Attorney Leftwitch and Morgan, neither of these gentlemen, though present, is offered in evidence to deny or explain what has been testified to as to the liability of the city.

Were these gentlemen authorized to enter into these arrangements?

It is objected that this authority could only be conferred by vote. But this vote need not be *in writing*. On the contrary it is now perfectly well settled, that the acts of corporations may be proved in the same manner as the acts of individuals. If there be no record evidence they may be proved by the testimony of witnesses. And even when no direct evidence of such acts can be

given, facts and circumstances may be proved from which the acts may be inferred.

Trustees v. Agger, 6 Barb., 580.

Where work is done for a corporation without complete legal authorization, is beneficial to it, and the price reasonable, strong evidence of the *assent* of the corporation is not required. Dillon, § 386.

The evidence of Foster, the city engineer, *supra*, shows that these bills were delivered to the contractors, with a request of the *city authorities* that they should use every effort to collect them, and the account on file with the city records shows the charge made for this purpose.

In the absence of all evidence on the part of the corporationto show the want of authority in the Mayor and city attorney, the very strongest presumptions arise, that they were authorized by the Board to act in the premises.

But if these officers were not, in the first instance, authorized by the Board, the evidence is sufficient to establish a *ratification* of their acts.

A municipal corporation may *ratify* the unauthorized contracts of its officers which are within the corporate powers, and this ratification may be inferred from *acquiescence*, after knowledge of all the material facts.

Dillon, § 385.

This is not the case of services rendered by a stranger to the party benefitted, and without his request.

When the bills were presented and not paid, the cash half became immediately payable and the other half in ninety days. Brown could then have sued the city for the whole amount. Dillon, § 402.

By the terms of the contract there were mutual obligations; Brown was to do the work, the city was to col-

lect the bills. Both parties had a direct interest in the collection. The cost the city should have borne has been paid by Brown. The services rendered are beneficial to the city, and we repeat that in the condition of this case, stronger evidence of the assent of the corporation, than is now produced, should not be required.

The *value* of these services is not disputed; the sole question is whether the city is bound ta pay for them.

As applicable to the facts of the whole case we cite the following.

GENERAL PRINCIPLES.

The exercise of corporate powers, and the character of evidence by which they are to be proved.

In the well considered case of Bank v. Dandridge, 12 Wheat., 64,—this court held that in statutory corporations "their acts afford the same presumptions as the acts of natural persons. Each affords presumptions from acts done, of what must have preceded them, as matter of right, or matters of duty."

That the omission to record its proceedings would not prejudice a party relying upon the good faith of an actual vote.

That its acts are not invalid, because not recorded, unless the statute makes such writing indispensable as evidence.

That the acts of a single authorized agent of a corporation binds it though he keeps no minutes of it, and those of a board of agents, do not differ in their operation as evidence.

Such a board may accept a contract, by a *tacit and implied assent.* This assent may be more difficult of proof by parol than if reduced to writing, but this is no reason for holding that such assent is inoperative.

That the rejection of presumptive evidence of the acts of corporations would be attended with serious public mischiefs, and shake many titles and rights which have been consummated in good faith."

This doctrine is again asserted in the case of United States v. Fillebrown, 7 Pet., 28; and State authorities to same purport are cited by Dillon, § 237, and note.

Kent, states it thus, that corporations may be bound by implied contracts, to be deduced by inference from corporate acts, without a vote, deed or writing; is a doctrine generally established in the courts of the several States, with great clearness and solidity of argument."

2 Comm. p. 291.

Adams v. City Memphis, 2 Cold., 645.

Where a corporation issues its negotiable bonds, it cannot dispute their validity as against a bona fide holder, by showing that the limitations and restrictions of the act which authorized their issue, were not complied with, nor that they were sold at less than par, in direct opposition to the requirement of the act.

Mercer County v. Hackett, 1 Wall, 83.

The doctrine "*Omnis ratihabitio retrotrahitur*" is held by this court to apply to corporations as well as to individuals; when the principal, with knowledge of the acts of his agent ratifies them, he is bound as fully as if he had given direct authority.

Such ratification may be by express consent, or by acquiescence, or by acts or conduct inconsistent with any other hypothesis than that of approval.

Where officers of a corporation openly exercise powers affecting the interests of third persons, which presupposes a delegated authority, and acts subsequently performed show that the corporation must have contem-

plated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed."

Supervisors v. Schenck, 5 Wall, 781.

The appointment of an agent of a corporation need not be evidenced by written vote of the directors. It is settled in the courts of this country that it may be inferred and implied from the recognition and adoption of the acts of the agent.

Story on Agency, § 52.

We therefore, submit, that there is no error in the decree, and that it should be affirmed.

P. PHILLIPS,
for Appellee.

Supreme Court of the United States.

THE CITY OF MEMPHIS
v.
T. E. BROWN.

I respectfully ask the attention of the court to the following matters not in my original brief:

Add to brief, page 55:

Where a county issued bonds in payment of a subscription to the capital stock of a railroad company, under an act of Assembly, which provided that they should not be sold under par, and the company disposed of a large amount of such bonds at 64 cents: held, that the county was entitled to rescind the subscription, to have a return of the bonds remaining in the hands of the company, and to be paid the par value of those disposed of.

Lawrence County *v.* N. W. R. R. Co., 32 Pa. (8 Casey) R., 144.

Decree was for the nominal amount of the bonds and interest, to be discharged in bonds and coupons issued for the subscription, and not for the market value of the bonds, or what they were sold for.

In New Orleans Navigation Co. *v.* De Lazardi, 2 La. An. R. (2 Robinson) p. 281, an action to recover damages for the conversion of the bonds of the city of New Orleans and State of Louisiana respectively, drawn payable to the order of the plaintiff, placed by the plaintiff in the hands of the defendants for sale at a price above par, and in violation of the contract pledged by the defendants for their own purposes, it was held that "the measure of damages where a

written security has been the subject of a tortious conversion is, ordinarily, the sum recoverable on that security, though the defendants have sold it for less."

And see 2d Greenleaf's Evidence, § 276.

Sedgwick, Measure of Damages, p. 488,* top ps., 4th edition, pp. 569, 570, says, where the property sued for in trover is a chose in action, as a bill, note, bond, or other security for the payment of money, it seems that the measure of damages is *prima facie* the amount due on the security, the defendant being at liberty to reduce that valuation by evidence showing payment, the insolvency of the maker, or any fact tending to invalidate the security.

See cases in Note 1.

Brief, page 79, add

2 Dillon on Municipal Corporations, § 784.

Reock *v.* Newark, 33 New Jersey R. Law, p. 129.

Brief, page 88, add

Reock *v.* Newark, 33 New Jersey R. Law, p. 129.

People *v.* Supervisors, 16 Johns. R., p. 59.

People *v.* Supervisors, 10 Wend. R., p. 363.

2 Dillon on Municipal Corporations, § 668, and cases cited.

Brief, page 89, add

That the provision for or guaranty of the sinking fund in the bond contracts passed to the parties to whom T. E. Brown & Co. passed the bonds.

Bank of Ashland *v.* Jones, 16 Ohio St. R., pp. 145, 162.

Mr. Sibley's brief, p. 33:

Constitution of Tennessee of 1836, art. XI, sec. 6, provided—

"The Legislature shall fix the rate of interest, and the rate so established shall be equal and uniform throughout the State."

It was, therefore, impossible for the Legislature to authorize more than one rate of interest.

See my brief, p. 54.

Mr. Sibley's brief, p. 13:

General corporation law, Code of Tennessee, secs. 1889, &c., applies only to corporations organized under it. It was passed in 1858. Memphis had then been an incorporated city, having a special charter, for many years. And several different charters, with special powers, have since the act been granted it by the Legislature.

Mr. Sibley's brief, p. 11:

That the city put in no replication to the answer to its bill.

The bill was filed in the State court of chancery.

It was removed to the United States circuit court under the act of 1866, as amended by the act of 1867.

14 Stat. at Large, p. 306, ch. 288.

14 Stat. at Large, p. 558.

The act authorizing the removal gives the pleadings removed the same effect in the Federal courts that they would have had in the State court had the cause remained there.

In the State court the bill had the effect of a replication; or rather, no replication was allowed.

Code of Tennessee, sec. 4322.

But this is not material, as there is probably no dispute as to the substantial facts stated in the city's bill.

Mr. Sibley's brief, pp. 31, 34:

Though the negotiation of one's own bond or note is ordinarily a loan in law, yet if a sale thereof be authorized by an act of the Legislature, it becomes a question of fact whether such negotiation was a loan or a sale.

Railroad Co. *v.* Ashland Bank, 12 Wall. 226.

This is the doctrine of White Water Valley Canal Co. *v.* Vallette, 21 Howard, 414, 424–426.

As there was no authority to the city to sell or negotiate the bonds at less than par, such authorities have no application.

Mr. Phillips's brief, pp. 4, 5:

The rule Mr. Phillips invokes has no application to our chancery practice in the United States circuit court in Tennessee.

We have no master's office, and no notice is given us of the preparation of the report.

Our first notice is the filing of it in the clerk's office.

We can, then, only file exceptions in the clerk's office.

The rule of the Supreme Court, prescribing the practice for courts of equity, seems to contemplate the course pursued in this case.

See Rule —.

Mr. Phillips' brief, p. 20:

The question whether City employed T. E. Brown & Co., or authorized them to employ attorneys to prosecute the suits on the paving accounts, arises on the cross-bill of Brown. The City in its answer denies the employment. This cast the burden of proof on Brown. He has made no proof.

Mr. Phillips' brief, pp. 22, 23:

The charter of the city required a record of the proceedings of its Board of Aldermen to be kept.

Memphis Ordinances for 1867, p. 191, sec. 27.

The Board of Aldermen was the legislature of the city.

Memphis Ordinances for 1867, pp. 185, 186, sec. 2.

The proceedings, therefore, could not be proved by parol.

But if they could be, no such proof is attempted to be made.

W. M. RANDOLPH,
Of Counsel for the City of Memphis.

Supreme Court of the United States.

No. 228.

CITY OF MEMPHIS
v.
BROWN & CO.

Heads of Argument of P. Phillips

IN OPENING FOR DEFENDANT IN ERROR.

S. & R. O. POLKINHORN, PRINTERS, D ST. NEAR SEVENTH.

Supreme Court of the United States.

CITY OF MEMPHIS
v.
BROWN & CO.
No. 226.

HEADS OF ARGUMENT OF P. PHILLIPS IN OPENING FOR DEFENDANT IN ERROR.

It is claimed by counsel for appellant that the decree should be reversed on the ground that the case was referred to the master before the chancellor had decided the principles of law involved in the case.

The cause was put at issue by replication on 7th April, and in the order of reference the parties were allowed to take evidence up to date of filing the report, which was on 2d September. The complainant was not deprived of any time asked for. On the contrary, the report concludes with the statement, "thereupon the counsel of the respective parties announced that they desired to offer no further evidence." p. 341. The examination was commenced on 25th May, and was always conducted in the presence of both parties.

In the matters of account the court may, in the first instance, refer to the master.

Field v. Holland, 6 Cr., 25.

There are cases in which it would be most proper that the questions of law should first be determined, for instance, when there is a demurrer, or plea of Statute of Limitations, or other plea, going to the whole merits of the demand. In such cases it would be unreasonable to subject the defendant to the expense and delay of a reference when, after the coming in of the report, the court might determine the demurrer on plea in favor of the defendant, and thus show that the reference was wholly useless.

We, therefore, pass to the merits of the controversy, and we may congratulate ourselves and the court, when we state that in this very voluminous record of over 800 printed pages, the whole evidence is harmonious. The case shows that the work of the contractors has been performed to the satisfaction of the city, while the city, on its part, has been faithless in its obligations to the contractors.

THE CONTRACTS.

On the 11th March, 1867, with T. McB. & Co.

Upon the completion of each section the contractors shall receive from owners one-half cash, bal., 30, 60, and 90 days.

The city *guarantees* the payment of said accounts.

The city to pay for the intersections on the same terms. p. 26.

Contract with F. M. & Co., 16th July, 1867.

Nothing said as to private owners.

The city to pay on completion of each section in bonds.

Principal and interest guaranteed by *sinking fund.*

Bonds to be taken *at par.* p. 33.

On 15th of Oct., 1867, this contract was modified as to price of some of the work.

The amounts so fixed to be assessed and collected from the owners, *as prescribed by the contract of T. M. B. & Co.*

The intersection to be paid in bonds. p. 35.

The guarantee contained in the first contract with T. McB. & Co. is thus stipulated for, and preserved in this modified contract of F. M. & Co.

On the same date, 15 October, F. M. & Co., requested the city to *substitute* T. Mc B. & Co. for them, in the original and modified contracts, and this was granted. p. 119.

On same day F. M. & Co., transfer to T. Mc B. & Co., all their rights in these contracts, and to "all claims for debts, demands, and *damages* against the city *already accrued*, or that may hereafter accrue, with a right to sue in their or our names." p. 312.

On the 6 may, 1868, T. Mc B. & Co., assign to T. E. Brown & Co., all their interest in these contracts, to all monies due, and all damages against the city, for failure to comply with their stipulations, including all damages heretofore sustained by any of the contracting parties, as well as those which may hereafter be sustained, with a right to sue for the same. p. 312.

On 2 June, 1868, the city adopted a report—approving

of this transfer to T. E. Brown & Co., of all these contracts to embrace "all the *unsettled and unadjusted claims* due the contractors, by the property holders and the city." p. 121.

Brown thus succeeded to all the rights which the prior parties had in these contracts.

But it is objected that he cannot claim for the *damages* suffered by these parties, because the law does not permit their assignment.

The doctrine of champerty and maintenance, has no application to such a case as this.

Story's Eq., 1048–9–50.

Here the party to be sued, consents to a substitution, and expressly agrees that the assignee shall succeed to "all the unsettled and unadjusted *claims*."

The word "claims," is a very proper description for a demand for damages.

The doctrine cited from Story, by the opening counsel, does not sustain him, for Story holds "that consistently with the principles, (in reference to champerty,) a party may purchase, by assignment, the whole interest of another in a contract or security which is in litigation, provided there be nothing in the contract which savors of maintenance." § 1850.

SINKING FUND.

Two questions arise on these contracts:

First, as to the liability for damages in not providing a sinking fund for the bonds, which were to be used as payment under the contract with F. M. & Co.

The equivalent for this guarantee was, that the bonds should be taken at *par*.

The price of the work was based on the faith of this stipulation.

It was represented by the city that this would make the bonds equal to about 90 cents.

The city failed to provide this security, and the bonds delivered, instead of being worth 90 cents had finally to be sold at 50.

It is said that the acceptance of the bonds was an implied waiver of the security.

It is against reason to make such an implication.

But, the evidence of Mitchell, is express, "I remonstrated with the city about their failure to provide this security, but could get no satisfaction."

The party had the right to rely on the good faith of the city.

This stipulation is in the nature of a warranty.

On principle and authority it would seem to be clear that the city should be held liable for the difference in value between the thing delivered, and that which was agreed to be delivered.

The evidence of the witnesses show what this differ- is and the decree awards this amount.

The difference between a funded debt and an ordinary obligation is well recognized in law.

Ketchum v. City of Buffalo, 14 N. Y., 367.

The transaction is of the same nature as if it had been a sale with warranty.

In such a case the vendee is said to have three remedies:

1. To refuse the article at all.

2. To receive it and bring his action for the breach of the warranty.

3. To use the breach in an action brought by the vendor.

This court refusing to give its assent to the first hold, the two other propositions to be undoubted.

Lyon v. Bertram, 20 How., 154.

It is, however, objected that the amount allowed is shown to be too large by a calculation on the price agreed to be paid for the work.

That is—it exceeds in amount the cash the parties would have received at the stipulated prices.

This is attempted to be shown by the brief of the city attorney. p. 96.

By taking the price on one street he figures out the estimate which must have been placed on the bonds on entering into the contract, at sixty-eight instead of the sum estimated by the master.

I refer, however, to a corrected estimate made by my colleague which shows that, in averaging all the streets, the amount calculated by the price exceeds that allowed by the chancellor.

GUARANTY.

The other question is as to the guaranty of the paving bills assessed against private owners.

It is objected, first, that the city had no power to make it.

Reliance is had on the act of 1866, (Bridge's Digest, p. 140) which, after providing that the corporation shall have complete control of the streets, declares that the

city shall have "*power to require* that the costs should be borne by the owners of adjoining property."

This is not an obligatory but a premissive direction.

It no wise impairs the authority conferred on the city by this and previous acts for the improvement of the streets.

How did the city itself understand this act?

This is shown not only by the contracts themselves but by an ordinance of the city cited on the brief of the city attorney at page 10, for the issue of $900,000 of bonds "for the purpose of paving the streets," and this was ratified by a popular vote.

See the opinion of the chancellor at page 5.

The city attorney admits, at p. 14, that a lawful contract could have been made by the municipality binding itself to pay for the laying of the pavement.

But could not guarantee the payment by the property holders.

If the city could make itself exclusively liable for a work under its jurisdiction and done for its benefit, by what reason could such a contract be invalidated because the parties are directed in the first instance to call on the property holders for payment.

Dillon, § 393, is cited to the effect that a corporation cannot become a surety for another corporation or individual, nor where it is empowered to effect a certain object can it become surety for another authorized to effect the same object.

But here no one is authorized to contract for the work but the city itself.

If the city possesses the power to make the contract it can put it in any form not prohibited by the grant of the power.

The case cited by Dillon, in his note to support the text, is where the corporation of New Orleans undertook to guarantee the bonds of a navigation company.

In the case of R. R. Co. v. Howard, this Court say: "Corporations, like individuals, are bound to good faith and cannot, by their acts, representations, or silence, involve others in onerous engagements, and then turn round and disavow their acts and defeat the just expectations their own conduct has superinduced.

"It is quite clear that it possessed the power to execute the instrument of guaranty appearing on the back of the bonds, and that in default of payment it became liable to the holders to the same extent as the obligors."

7 Wall., 413.

It is then said that, admitting the power, no liability against the city arose on the guaranty until the legal remedy had been exhausted against the private owner.

The contract was made with the city, the assessments and the bills were to be made by the city, and also their collections.

The agreement was plainly this, for the price agreed to be paid by the city, it said to the contractor, I will assess the property holders, make out bills against them, which I will deliver to you. On presentation, one-half shall be paid by them in cash, the balance in 30, 60, 90 days, and these payments I guarantee.

That the city, on default of the property holders, became immediately liable is too plain a proposition for argument.

It is not necessary that suit should be brought against the property owners. Douglas v. Reynolds, 7 Pet., 128.

The reliance for the opposite construction is on the great efforts made by Brown to collect the money from the property owners.

That is, the failure of the city to comply with its obligations, is made the ground for a denial of its liability.

It is also insisted, that the city is not liable on the ground of the stipulation contained in the loan contract hereinafter recited, that "the contractors *will* release the city from all liability upon the paving contract, unless it should be decided by the court of last resort that the property holders are not liable for said pavement."

We shall show subsequently why this contract will not be enforced in Equity.

It is sufficient now to say, that since the decree in this case, the court of last resort *has decided* that the property owners were not liable to the assessment.

And as the court has now the power to render such judgment as should have been given, it will not reverse the decree if on another hearing the same decree must be entered.

HOW DID THE CITY FULFILL ITS OBLIGATIONS?

The evidence shows that the contractors performed their work to the satisfaction of the city.

On the other hand, it is testified by the Mayor, ("Lofland,") that the city was very much embarrassed, did not pay the cash as per agreement, that it was generally behind hand with the contractors, who had always trouble to get their pay *in any manner*. p. 183.

When asked if the city had ever paid *one dollar in cash* according to agreement.

He answeres in the negative. p. 184.

SALTER, testifies.

The city failed to carry out the contract by failing to pay for the work that was done from time to time.

By this failure the contractors were put to much inconvience, and expense in obtaining funds for the prosecution of the work, and were thus damaged to a large amount. p. 228.

The whole case shows a continued violation of obligation on the part of the city, and a resort to every delay, so common in cases of parties laboring under pecuniary embarrassment.

THE BILL.

In 1870, Brown brought his action against the city for the sum of $600,000, the amount due on the contract.

While this action was pending, to wit, on 26 November, 1870, the city filed this bill, and by agreement, the action at law was brought in for the purpose of making a final disposition of the controversy.

The bill sets out all the transactions between the parties, and seeks to enforce two certain agreements as "*loans.*" It prays for an account, and for general relief.

The loans referred to are evidenced by two resolutions of the Board, as follows:

On 1 September, '68, the Mayor reported, that owing to the delinquency of the property owners, he had agreed with the consent of the Board of Aldermen, in executive session, to loan $100,000 bonds, at $100, for 18 months, to be secured by transfer of paving bill to like amount.—Approved, p. 305.

On 18 November, '68, another resolution was adopted to loan 175 of the 30 year bonds on a like security, and on further consideration, that the contractors will *release the city "from all liability upon said paving contracts, unless it*

should be decided by the court of the last resort, that the property holders were not liable for said pavement. p. 306.

Insisting on the release contained in the latter resolutions, it avers the delivery of all the bonds on the former, and on the latter $140,000, and for the remaining $35,000, their letters of acceptance.

We give the form of one of these letters.

"As soon as it is possible to sign them, I will issue to your order with the January coupons, on————30 year bonds on the loan of November 18, 1868. You may use this in any negotiation, and the bonds can be delivered to your order on return of this letter." p. 298.

Brown, in his answer, describes the large indebtedness of the city to him, at the date of these loans; its repeated failure to comply with its contracts, and expressly avers, that these were mere nominal loans, but in reality, and by express agreement, merely modes of enabliag him to go on with the work by selling the bonds, and so realizing for what was due to him.

That these agreements were never performed by the city. That on the first loan only eighty-nine bonds could be obtained; that on the second loan, though the city had in its possession, blank bonds which only required signature, they refused to deliver any, though daily importuned. That on the 1 December, instead of bonds, the city would only deliver its letters called "acceptances." No steps were taken to fulfil the promise therein contained. Only twenty-five bonds were delivered on these letters as late as 15 December, and some others at the close of this month, and in January, 1869; some not until May following, and that $11,000 of the first loan, and $35,000, of the second were never delivered at all. pp. 53, 54.

Further, that the bonds delivered in May, were in vio-

lation of the agreement, shorn of the coupons for January and July, 1869,—and again, that the city had, in violation of the agreement, put it out of its power to fulfil it, by appropriating $40,000 of these bonds agreed to be thus loaned, to other uses.

It is also averred in the answer, that at the time these pretended loans were made, these bonds had a well known market value of but fifty cents, and from that time to this they have been sold for no more.

The answer is strictly responsive to the bill, and throws upon the complainant the burthen of disproving its averments.

But we need not resort to this rule of evidence, for in this case there are no disputed facts—the evidence is entirely harmonious.

At the time of these pretended loans, the city was indebted to Brown about a half million of dollars.

It had never paid the contractors one dollar in cash, nor fulfilled any of its obligations. Its constant and persistant delinquency had driven out the two first contractors in despair, and brought the third to the brink of bankruptcy.

In this state of affairs it refused to make any payment or fulfill any of its obligations. The only thing it would do was to make these loans.

Here is a case of moral duress. The relation of the parties by this arrangement is reversed. Brown, the creditor to a large amount, becomes debtor. The city the debtor,—has its liabilities all extinguished,—and becomes a creditor by a loan at interest.

A court of equity will not lend its aid to enforce so unconscionable an agreement. It will never exercise its discretion to enforce even a hard bargain, when the party invoking its aid is himself in default.

The difference between that degree of unfairness which will induce a court of equity to interfere actively in setting aside a contract, and that which will induce the court to withhold its aid, is well settled.

On a bill filed to enforce the contract, the defendant can resist it by showing that it was unconscientious or unreasonable.

And in judging of the unfairness, the court will not look merely at the terms of agreement itself, but at the *relalation of the parties*, and all the surrounding circumstances.

Cathcart v. Robinson, 5 Pet., 276.
Marble Co. ——— 10 Wall., 357.
Kitchens v. Raymond, this term.
Crane v. Decamp, 6 C. E. Greene.

If the agreement had been a fair one, it was never performed by the city. It was to deliver bonds; instead of these it delivered letters. These letters promised an immediate delivery of bonds; this promise was also violated. The delivery was delayed unreasonably. A large amount was never delivered at all. Of the bonds delivered the coupons for January and July were exscinded in express violation of the terms. These are the circumstances under which the city files its bill to enforce these contracts.

The evidence, showing the want of good faith on the part of the city, and its failure to fulfil these agreements, is not contradicted, and will be found in the depositions of—

Venable, p. 220.
Barret, p. 221.
Brown, p. 279.

The evidence shows the true understanding between

the parties in reference to the transaction. The bonds were in fact delivered to enable Brown to dispose of them for the purpose of going on with the work.

Ballard testifies "these bonds were given with the express understanding that they should be sold to meet our bills payable, then rapidly maturing. p. 264. A more full account of the character of this agreement is given by Ballard, at p. 267.

It would be very extraordinary that Brown should have agreed to receive and return these bonds at par with interest, when for ten years their market value was but fifty cents. The day after he received them he sold them at forty-nine cents.

We, therefore, insist:

First, that the city did not comply with the terms of the agreement.

The letters of credit were not an equivalent for the bonds, and if they were, the provision contained in these letters, were not in good faith fulfilled.

Second, if the city had fully complied, the circumstances under which these agreements were made, show them to be so unjust that a court of equity would not lend its aid to enforce them.

Third, the evidence shows they were not in reality loans, but advances made by a debtor to his creditor.

It is admitted in the brief of the city attorney, p. 49, that these agreements could be satisfied by Brown, without returning the specific bonds loaned, that is, by tending an equal amount of bonds, and this is proved by Ballard to have been the agreement. p. 297.

He complains of the allowance of a credit to the city

of 50 cents on the dollar and interest, though it is admitted, that is their fair market value.

He says that Brown can purchase at that rate, but the city ought not and could not.

If the city has loaned a thing worth but $50, and receives back that sum with interest, it has received a just equivalent, and one that by reasonable inference must have been in contemplation of the parties.

$35,000 of the very bonds appropriated to Brown under this loan, and which in violation of the agreement were withheld from him, were applied by the city in payment of its interest at 50 cents.

But the reason assigned, why the city cannot replace the bonds, if they so desired it by the amount paid to it, is not true in fact, for by the official report of the officers of the city, it is now shown that since the decree, the city has been, and is in the market, purchasing these bonds, at 50 cents and less.

SALES AT LESS THAN PAR.

The evidence shows that the bonds and scrip of the city were delivered to the contractors, at various times, under special agreements fixing their value.

The decree has carried out these agreements and credits have been allowed accordingly.

There is no dispute as to the terms of the agreements.

There is no denial of the power of the city to issue its obligations.

Nor, that they were delivered to the contractors by officers entrusted with their delivery.

It is, however, denied that there was any authority in the officers or in the city itself, to use these obligations *at less than their par value.*

What has been the construction of the city itself as to this power, evidenced by its practice?

Bridges, the *Treasurer*, tells us that as far back as 1856, the city sold $250,000 bonds for cash; since 1868, over one million.

They had a market value, and were the subject of purchase and sale.

Those sold in 1856 realized fifty-two cents.

Those sold in 1868 realized fifty cents.

The same practice to raise revenue was continued in 1869. p. 197.

About $750,000 were sold for 56.

Again, he says "the city has for ten years or more dealt with its bonds, &c., as subject to market quotation, and purchase and sale. p. 200.

As to the authority of the officers who made the sale, he says. See page 198.

That the city authorities *recognized* this course of dealing is shown by their books. In the entry of "$630,000 for interest and *discount on sale of bonds.*" p. 213.

Also in the entry as to the agreement by which Brown received $12,000 bonds at sixty cents, though worth but fifty. Thus—

1868, *January* 8.

To proceeds of twelve bonds $7,200. p. 12.

It is not necessary to cite further from the evidence of witnesses to same effect.

On the 3 March, 1869, a spasmodic effort was made to change this course of dealing with the bonds, and a resolution was adopted "that under no circumstances shall the bonds about to be issued be put upon the market except as collateral for their face value. p. 335.

This virtuous resolution lasted but three weeks, for, on the 27 March, the city resolved its repeal.

Beyond question, therefore, the city authorities had no doubt as to their power to sell its bonds for less than their par value, and on this interpretation they have acted for over ten years without any complaint.

The same remarks apply to the city warrants or scrip.

The Mayor testifies "the city did not pay the contractors in cash as per agreement, but in the city warrants at their market value." p. 183.

In the same mode the city expenses were paid.

This scrip was worth from thirty-five to fifty.

The Treasurer says: "the amount due in cash to T., McB. & Co. and to Brown was paid by delivery to them of such an amount of city paper as, if sold, would nett so much cash." p. 199.

As an illustration; $40,000 of this paper were delivered to Brown in payment at such price as might be realized.

The master credits the city with $18,322.50 on this agreement.

In the city records produced by Richards, the city Register, we have this entry.

1868, *August* 9.

By discount on scrip per comptroller's order.....	$21,677.50
Profit and loss.....	18,322.50
p. 317	$40,000.00

Were these several transactions for the delivery of bonds and warrants, originally authorized by the board or subsequently ratified by it?

We have given two instances in which the agreements

were ratified by credits given in the books of the Corporation.

In no manner has the city offered evidence to disprove by witnesses any of the agreements set up.

It has produced the minutes of the board, and relies solely on the *silence* of those minutes to show that *some* of them were not authorized.

The agreements are specifically set forth in the answer, and presented to the master, yet no member of the city counsel is offered to deny the authority of the officials who contracted them.

Nor are the officials themselves called on to testify.

It is not necessary to bind the corporation that there should be a *recorded vote.*

The evidence shows that it was customary to hold executive sessions, of which no minutes were kept.

From all this, there is no escape from the conclusion, that the board believed it had the right to make these arrangements, and that they were properly entered into.

But it is maintained that whatever might have been the action of the city, or how long continued, it had no right under the grant of power, to issue bonds, to dispose of them at less than their par value.

The power is granted to Congress to borrow money. As an incident to this they execute bonds and sell them for their market value.

The States with an unrestricted sovereignty issue bonds and place them on the market.

Municipal corporations do not possess this power by the mere act of incorporation.

But when the power to issue bonds is conferred upon it

by the legislature of the State, without limitation or restriction, then it can be exercised in the same manner as by the State itself.

The authority to sell is an incident attendant upon and growing out of the authority to issue.

Griffith v. Burden, Oct., 1872, 6 Western Jurist, 464.

Judge Emmon's opinion is found at p. 495, and is followed by an editorial note with citations, approving the same at p. 510.

Even when bonds have been sold at less than par, in direct opposition to the act authorizing it, this Court has held that such bond in *bona fides'* hands could not be defeated for want of power, though the bond recited the act under which it issued.

Mercer Co. v. Hackett, 1 Wall., 83.

Much reliance is placed in the brief of the city attorney, p. 52, on the expression found in the opinion of Judge Selden in Gould v. Sterling, (23 N. Y., 461,) to this effect: "No express power to *sell* the bonds is given, and no such power, I think, can be implied."

By an examination of the case, admitting it to be authority, it will be seen that it does not support the point now under discussion.

The grant was to *borrow* $25,000, to be expended in grading and constructing a certain railroad. This was approved by a popular vote. Instead of executing this power, the city issued to the railroad its bonds, which the company sold at a heavy depreciation. Upon this state of facts, the Judge held, "If the statute had been pursued the company would have had a *sum equal to the par value of the bonds.* As it was, they were compelled to sell the bonds at a discount to realize the money."

In the same volume this case is immediately preceded

by Starin v. Genoa, though this was decided subsequently to it. (p. 454.)

There the Court said: "It was evidently the intention of the act, that *money* should be raised and paid over on the construction of the road, and no color is given to the idea that the *credit* merely of the loan was to be used by which the money was to be raised. A town might be willing to incur a debt to a limited sum, with the knowledge that the whole amount for which it was incurred was actually to be appropriated to the construction of a road conducive to its interests, but would absolutely refuse to issue its bonds for the purpose of sale, from which much less than the amount for which they were given might be realized."

We repeat, therefore, that this case may be supported without at all impairing the argument now offered. But it would seem to have had no effect on the discussion of corporate powers had in the case of Rogers v. Burlington, 3 Wall., 666, and is relied on only by the judge who dissented in this case.

Nor can the the plea of usury prevail to invalidate these transactions.

In the report of the master, he states as one of his findings

"That no proof is offered by the city that the contractors ever received any profit by the sale of such paper or more by the sale than was justly due them by the city." p. 347.

On the contrary the evidence shows that in many of the transactions, the necessities of the contractors compelled them to allow largely more than the market value, and this submit to a heavy loss.

On the two Bond transactions, one for $55,334, and the other for $12,000; Brown allowed for the first 52, and for the second 60 cents, and he sold them the next day at 50 cents. p. 263.

The theory is based upon the idea expressed in the dissenting opinion of Judge Selden, in 15, N. Y. 84, that a sale by the maker of his promissary note was a legal absurdity, and must be a *loan.*

This if true has no application to public securities.

In the case of Griffiths v. Burden, already cited, it is held that the power to issue bonds, or to do any work requiring the issuance of bonds, carries with it the power to sell the bonds in the market.

"The character of a chattel attaches to them under such circumstances, and the title passes as effectually as if they were chattels sold in the market at their market value."

THE AMOUNT ALLOWED FOR COLLECTION OF PAVING BILLS.

It is again objected that the master allowed for services in collecting the paving bills.

These services were rendered at the request of the city and involved the employment of numerous agents as well as attornies.

Through these agencies, Brown collected without suit $687,292, besides notes taken as collateral to the amount of $25,000, and for these services the master allowed $25,000.

The extraordinary efforts and unusual means employed for this purpose, are fully described in the deposition of Waddell and Baldwin. p. 180, 250.

Merchandise of all kinds, horses, wagons, &c., were received in payment at prices throwing a heavy loss on

the contractor. A store had to be opened for the resale of these articles. The bills due by the proprietors of hotels, were collected by sending persons to board with them. In this manner one hotel, the Overton, paid their bill of $4000. Deposition of Waddell, p. 180; Baldwin, p. 250.

The majority of the property holders refused absolutely to pay anything, declaring that the city had no power to assess them. Against these some 4 or 500 suits were commenced, and these were brought by Humes & Poston, and Jarnagin, Morgan & Frazier, employed for the purpose. For their services in this litigation, the master allowed $10,000.

It will be remembered that by the contract, the city guaranteed the payment of the bills, one half of which was to be paid in cash, and the remainder in 30, 60, and 90 days. *These bills the city was bound to collect at its own expense.*

The evidence on which the city is held liable for the items allowed by the master is to be found in the following depositions.

WADDEL testifies, that "the Mayor and city attorney were apprised of the extraordinary efforts we were making to effect collections without suits, and approved the same, and urged us to make all possible." In frequent visits to Mayor Leftwich he expressed "his anxiety for us to effect collections in the manner we were pursuing, his idea being to get as much as possible without suit. My recollection is that Mr. Morgan, the city attorney advised the same course." p. 181.

FRANCIS FOSTER, city engineer—"The unpaid bills were from time to time returned to me by the contractors, and I placed them in the Mayor's hand for presentation to the city attorney under the terms of the con-

tract. The bills were afterwards *returned to the contractors* by the hand of Mr. Salter, with *a request of the city authorities* for the contractors to use every effort in pressing the payment of the bills without resorting to the legal measures contemplated by the contract." p. 196.

BALDWIN. "Brown & Co., made every effort that could be made by themselves, and all the assistance they could get, running through two or three years. The Mayor of the city and city attorney requested Brown & Co., to make all the collections they possibly could before bringing suit. I know that Brown & Co. employed attorneys to make collections of these bills. They did so at the request of city attorney. p. 250.

BALLARD. "From shortly after the work commenced, to June '69, collections were made with the greatest and most persistent effort from property owners at the request and under the advice of the Mayor, city attorney, and other city officers. For this purpose the contractors not only kept constantly four or five men employed, but also the employees were directed to make exchanges for material, labor, goods, and everything which would go to make up and lesson our cash expenses. All this was done at a loss from 10 to 20 per cent. In my judgment $25,000 would be a low charge to the city for all that was done by the contractors not required by the contract of them in making collections without suit."

Both the city attorney Morgan and Mayor Leftwitch, suggested to the contractors to retain counsel to assist the city in looking up titles, learning the proper parties to be made defendants, and bringing the many suits on the bills. I remember distinctly Col. Morgan said that it would be impossible for him, or any one man with all the other city business, to attend to this matter alone, and that somebody must be retained to assist him; and,

after some reflection, he said he would prefer Messrs. Humes & Poston. p. 260-1.

Brown. "The collections that have been made by us, both by suit and otherwise, have been made under the direction of the city, and at the city's request. Both the Mayor Leftwitch and city attorney Morgan requested that every effort should be made to collect bills without suit by turns and trades, exchanges and discounts, and putting a large collection force at work, and making every effort to work as many of the bills into the paving of the streets as possible. Their advice and direction was followed. After it became evident it was necessary to sue, the city authorities advised suits to be brought and to employ counsel to aid Col. Morgan in the examination of titles, drafting papers and the work of sueing. Col. Morgan took us to the office of Humes & Poston, saying that the city business outside of this was so large that it would be impossible for him to bring these suits; that he must have assistance and preferred them. The Mayor said substantially the same thing, and under their direction I retained Humes & Poston, who brought about 400 suits. p. 278.

On cross-examination, he says—"I did not at the time understand that we had employed as counsel, the firm of Morgan, Jarnagin & Frasier, as I supposed whatever they did, would be done for the city, as Morgan, of that firm, was city attorney.

But afterwards it was claimed by the firm, that Mr. Langdon when here had employed them, and that it was not their understanding that Jarnagin & Frasier should do what they did, on account of Morgan's relation to the city, as attorney.

The amount paid to them was $2,300. p 280.

Among the accounts produced by Hoy, clerk to the

corporation, examined on its behalf, is one rendered by Brown, and shows this entry.

Amount paid for bringing suits on pavement bills, and other legal services, which under our contract with the city, the city agreed to do, but did not do..... $8,000

Court costs advanced.

Commissions paid on collections. p. 292.

The amount of labor performed by the attorneys thus employed, is fully set forth in the deposition of Mr. Poston of the firm of Humes & Poston, p. 303.

We have here the express evidence that both the Mayor and city attorney, directed Brown to use all the means necessary to collect as much as could be done without suit, and when these means were exhausted, to employ counsel to bring suits.

The work to be thus done was in the discharge of an obligation, which the law of the contract imposed on the city.

It was done in the presence of the city, with its full knowledge and acquiescence.

The city had full knowledge that the labor was being performed at its cost, as shown by the account referred to.

The city has reaped the full benefit of the services performed.

Under these circumstances, it cannot escape responsibility by saying to the defendant, you have not shown that the city ever passed an ordinance or resolution which authorized the Mayor and city Attorney to enter into such an engagement.

The city has not offered any evidence to rebut the presumptions which arise from the acts of its agents. It

has not produced its records, and *what is very significant*, while the witnesses specially name the Mayor, and Attorneys Leftwitch and Morgan, neither of these gentlemen, though present, is offered in evidence to deny or explain what has been testified to, as to the liability of the city.

Were these gentlemen authorized to enter into these arrangements?

It is objected that this authority could only be conferred by vote. But this vote need not be *in writing*. On the contrary, it is now perfectly well settled, that the acts of corporations may be proved in the same manner as the acts of individuals. If there be no record evidence, they may be proved by the testimony of witnesses. And even when no direct evidence of such acts can be given, facts and circumstances may be proved, from which the acts may be inferred.

Trustees v. Agger, 6 Barb., 580.

Where work is done for a corporation without complete legal authorization, is beneficial to it, and the price reasonable, strong evidence of the *assent* of the corporation is not required. Dillon, § 386.

The evidence of Foster, the city engineer, *supra*, shows that these bills were delivered to the contractors, with a request of the *city authorities* that they should use every effort to collect them, and the account on file with the city records shows the charge made for this purpose.

In the absence of all evidence on the part of the corporation to show the want of authority in the Mayor and city attorney, the very strongest presumptions arise, that they were authorized by the Board to act in the premises.

But if these officers were not, in the first instance, authorized by the Board, the evidence is sufficient to establish a *ratification* of their acts.

A municipal corporation may *ratify* the unauthorized contracts of its officers which are within the corporate powers, and this ratification may be inferred from *acquiescence*, after knowledge of all the material facts.

Dillon, § 385.

This is not the case of services rendered by a stranger to the party benefitted, and without his request.

When the bills were presented and not paid, the cash half became immediately payable and the other half in ninety days. Brown could then have sued the city for the whole amount. Dillon, § 402.

By the terms of the contract there were mutual obligations; Brown was to do the work, the city was to collect the bills. Both parties had a direct interest in the collection. The cost the city should have borne has been paid by Brown. The services rendered are beneficial to the city, and we repeat that in the condition of this case, stronger evidence of the assent of the corporation, than is now produced, should not be required.

The *value* of these services is not disputed; the sole question is whether the city is bound to pay for them.

As applicable to the facts of the whole case we cite the following:

GENERAL PRINCIPLES.

The exercise of corporate powers, and the character of evidence by which they are to be proved.

In the well considered case of Bank v. Dandridge, 12 Wheat., 64, this court held that in statutory corporations "their acts afford the same presumptions as the acts of natural persons. Each affords presumptions from acts done, of what must have preceded them, as matter of right, or matters of duty."

That the omission to record its proceedings would not

prejudice a party relying upon the good faith of an actual vote.

That its acts are not invalid, because not recorded, unless the statute makes such writing indispensable as evidence.

That the acts of a single authorized agent of a corporation binds it though he keeps no minutes of it, and those of a board of agents, do not differ in their operation as evidence.

Such a board may accept a contract, by a *tacit and implied assent.* This assent may be more difficult of proof by parol than if reduced to writing, but this is no reason for holding that such assent is inoperative.

That the rejection of presumptive evidence of the acts of corporations would be attended with serious public mischiefs, and shake many titles and rights which have been consummated in good faith."

This doctrine is again asserted in the case of United States v. Fillebrown, 7 Pet., 28; and State authorities to same purport are cited by Dillon, § 237, and note.

Kent, states it thus, that corporations may be bound by implied contracts, to be deduced by inference from corporate acts, without a vote, deed or writing, is a doctrine generally established in the courts of the several States, with great clearness and solidity of argument."

2 Comm., p. 291.

Adams v. City Memphis, 2 Cold., 645.

When a corporation issues negotiable bonds, it cannot dispute their validity as against a bona fide holder, by showing that the limitations and restrictions of the act which authorized their issue, were not complied with, nor that they were sold at less than par, in direct opposition to the requirement of the act.

Mercer county v. Hackett, 1 Wall., 83.

The doctrine "*Omnis ratihabitio retrotrahitur*" is held by this court to apply to corporations as well as to individuals; when the principal, with the knowledge of the acts of his agent ratifies them, he is bound as fully as if he had given direct authority.

Such ratification may be by express consent, or by acquiescence, or by acts or conduct inconsistent with any other hypothesis than that of approval.

Where officers of a corporation openly exercise powers affecting the interests of third persons, which pre-supposes a delegated authority, and acts subsequently performed show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed."

Supervisors v. Schenck, 5 Wall., 781.

The appointment of an agent of a corporation need not be evidenced by written vote of the directors. It is settled in the courts of this country that it may be inferred and implied from the recognition and adoption of the acts of the agent.

Story on Agency, § 52.

These doctrines are fully sustained in the able work of Lindley on companies.

In treating of acts *intra vires* but irregular, he says:

As to these, one who fairly deals with the company is not to be defeated because the directors failed to comply with the mode prescribed for the performance of the act. pp. 261, 263.

The leading case of Tarquand to which he refers is cited with approbation by this court in Knox County v. Aspinwall, 21 How., 539; and in Moore v. Miami County, 2 Bl., 724.

I have thus endeavored to condense as much as possible the facts of this case and the general principles of law applicable to them.

The amount involved in the decree is a very large one. The present defendant has thus far, with the aid of friends, been able to sustain himself under the burthen which its non-payment has imposed.

The want of faith on the part of the city compelled the withdrawal of the former contractors, and the question is shall that faithlessness bring ruin upon the party now before the court.

I do not express more than I feel when I say that the decree of the learned chancellor is fully sustained by the reason and authority set forth in his opinion.

If, however, I should be mistaken and the court should conclude that there is some item in the account which should be disallowed, then I earnestly ask of the court not to subject us to further delay, but that it should itself *affirm* the decree with such modifications as may be deemed proper.

P. PHILLIPS,
for Appellee.